CLERK'S COPY.

192

749458
Sub 64

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 92

WALTER P. GARDNER, TRUSTEE OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PETITIONER,

vs.

THE STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1946.

CERTIORARI GRANTED JUNE 10, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 92

WALTER P. GARDNER, TRUSTEE OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PETITIONER,

vs.

THE STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Third Circuit	a	1
Appendix to Petitioner—Appellant's Brief	a	1
Relevant docket entries	1	1
Petition for writ of prohibition	12	10
Order to show cause	27	22
Answer of Guy L. Fake, one of the judges of the United States District Court for the District of New Jersey	28	22
Exhibit "A"—Interim Report of Special Master	34	26
Exhibit "B"—Opinion confirming Special Master's Report	50	40
Exhibit "C"—Order No. 271 Overruling Objections of State of New Jersey to Interim Report of Special Master Dated January 17, 1945 and Confirming Said Report	51	41
Petition for An Order of Approval under Section 205, Title 11, United States Code, and for Further Relief	54	43
Petition for Adjudication Concerning New Jersey State Tax Claims and for Order No. 250	55	43
Schedule "A"—Proof of Claim No. 38	82	64
Schedule "C"—Paragraph 9 of Claim	88	70
Schedule "B"—Objections to Proof of Claim No. 38	90	71
Schedule "C"—Final Decree	98	77

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPT. 16, 1946.

—6625

Appendix to Petitioner—Appellant's Brief—Continued	Original	Print
Special Appearance of Walter D. Van Riper, Attorney General of the State of New Jersey, for the Sole purpose of Objecting to the Jurisdiction of the Court to Entertain "Petition for Adjudication Concerning New Jersey State Tax Claims and for Order No. —," Filed by the Trustees Herein on August 12, 1944	100	78
Order No. 250 Re-Referring to Special Master the Disputed Tax Claims of the State of New Jersey, All Existing or Additional Objections Thereto and the State's Reply to Said Objections, and Also Referring the State's Motion to Dismiss the Trustee's Petition dated August 12, 1944 for Adjudication of Said Claims	103	80
Notice of Appeal	106	83
Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey	107	83
Reply of State of New Jersey to "Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey"	115	90
Objections of Institutional Group and the Trustee of the Debtor's General Mortgage to Claim No. 38 Filed by the State of New Jersey	143	112
Reply of State of New Jersey to "Objections of Institutional Group and the Trustee of the Debtor's General Mortgage to Claim No. 38 Filed by the State of New Jersey"	147	115
Interim Report of Special Master	148	116
Objections of State of New Jersey to Interim Report of Special Master	165	129
Opinion Confirming Special Master's Report	175	137
Order No. 271 Overruling Objections of State of New Jersey to Interim Report of Special Master Dated January 17, 1945 and Confirming Said Report	177	138
Notice of Appeal	180	141
Statement of Points to be relied upon on appeal	181	141
Stipulation concerning portions of record in District Court of the United States for the District of New Jersey in Proceedings for Reorganization of Central Railroad Company of New Jersey, No. 29,778, for use on hearing of No. 8861 and No. 8889	182	142
Order asigning judge	189	147
Minute entry of hearing	189a	147
Opinion, McLaughlin, J.	190	148
Judgment	212	168
Orders deferring issuance of mandate	213	168
Petition for rehearing	217	170
Order denying petition for rehearing	237	186
Clerk's certificate	238	186
Order allowing certiorari	238a	187

	Original	Print
Stipulation and addition to record	239	187
Portions of record in District Court of the United States for District of New Jersey in Proceedings for Reorganization of The Central Railroad Company of New Jersey, No. 29,778:		
Petition for an order of Approval under Section 205 Title 11, United States Code, and for further relief	244	191
Order No. 3 restraining David T. Wilentz as Attorney General from entering judgment and issuing execution for collection of taxes for the years 1932 and 1933	250	195
Petition for Order No. 7 instructing Debtor whether it should pay any part of the taxes assessed against its property by the State of New Jersey for the years 1939 and if so what part	252	196
Affidavit in support of Petition for Order No. 7	257	199
Order No. 7 to show cause why an Order should not be entered instructing Debtor whether it should pay any part of the taxes assessed against it by the State of New Jersey for the year 1939 and if so what part	260	201
Parts of Minutes of Hearing before Hon. Guy L. Fake, U. S. D. J., December 13, 1939	262	202
Order No. 11 directing Debtor to pay $2,049,553.23 on account of taxes assessed against its property by the State of New Jersey for the year 1939	320	220
Petition for Order No. 53 authorizing the Trustees to pay monthly installments on account of taxes assessed against property of the Debtor by the State of New Jersey for the years 1932 and 1933	322	222
Minutes of Hearing before Hon. Thomas Glynn Walker, U. S. D. J., on June 12, 1940	326	224
Order No. 53 authorizing the Trustees to pay monthly installments on account of taxes assessed against property of the Debtor by the State of New Jersey for the years 1932 and 1933	334	230
Petition for Order No. 66 fixing the time within which and prescribing the manner by which claims of creditors shall be filed	335	231
Parts of Order No. 66 fixing the time within which and prescribing the manner by which claims of creditors shall be filed	337	232
Parts of Order No. 93 allowing certain claims and referring to Special Master certain disputed claims and the objections thereto, and referring the question of priority of claims	343	234

	Original	Print
Stipulation and addition to record—Continued		
Petition of Trustees for instructions concerning payment of certain taxes levied by the State of New Jersey, and for show cause order thereon No. 71	350	236
Answer of State of New Jersey to Order No. 71 to Show Cause	353	238
Order No. 72 directing the Trustees to pay certain amounts on account of New Jersey State taxes for which the Debtor is directly or indirectly liable	356	240
Part of Printed Copy of Reply of Claimant, State of New Jersey, to Trustees' objections to tax claims	359	242
Petition of the Trustees of the Debtor for authority to compromise, pursuant to Chapter 290 of the Laws of New Jersey of 1941, certain taxes levied by the State of New Jersey for the years 1932 to 1940, inclusive, etc.	367	246
Order No. 123 authorizing the Trustees of the Debtor to compromise, pursuant to Chapter 290 of the Laws of 1941, certain taxes levied by the State of New Jersey for the years 1932 to 1940, inclusive, etc.	377	253
Petition of Trustees for Order No. 135 instructing them concerning payment to the State of New Jersey of taxes levied against the Debtor and certain of its affiliated companies for the year 1941	381	255
Parts of Minutes of Hearing before Hon. Guy L. Fake, U. S. D. J., November 24, 1941	388	261
Order No. 135 instructing the Trustees to pay to the State of New Jersey on or before December 1st certain taxes levied against the Debtor and certain of its affiliated companies for the year 1941	404	268
Petition of the Trustees for instructions whether or not they should comply with Chapter 241 of the Pamphlet Laws of New Jersey of 1942 and for Order No. 161 requiring the Attorney General, the Comptroller, and the Treasurer of the State of New Jersey, and all other parties, to show cause, etc.	407	270
Order No. 161 to Show Cause	417	278
Order No. 163 adjudicating the amounts in which the claims of the State of New Jersey should be allowed and directing the Trustees to comply with Chapter 241 of the Laws of New Jersey of 1942	419	279
Petition of Trustee for Order for instructions regarding the payment of taxes to the State of New Jersey	429	287

	Original	Print
Stipulation and addition to record—Continued		
Order No. 333 authorizing and directing Trustee to make payment on account of taxes claimed by State of New Jersey	442	296
Part of Minutes of Hearing before Hon. Guy L. Fake U. S. D. J., April 26, 1946	445	298
Receipt of Homer C. Zink, Commissioner, Department of Taxation and Finance of State of New Jersey, dated May 6, 1946	509	318
Clerk's certificate (omitted in printing)	510	

[fol. a]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8861

In the Matter of the Application of the State of New Jersey for a Writ of Prohibition

No. 8889

In the Matter of The Central Railroad Company of New Jersey, Debtor

State of New Jersey, Appellant

On Appeal from Order No. 271 of the United States District Court for the District of New Jersey. In Proceedings for Reorganization of a Railroad.

Appendix to Petitioner-Appellant's Brief—Filed April 19, 1945

[File endorsement omitted.]

[fol. 1]

In United States District Court, District of New Jersey

Relevant Docket Entries

1939

Oct. 30—Petition for Reorganization under Section 77-A filed 3:00 P. M. at Newark, N. J.

Oct. 30—Order approving Petition as properly filed, continuing debtor in possession, directing filing of schedules and Rule to Show Cause why Trustees should not be appointed, returnable Nov. 27, 1939.

Nov. 9—Proof of Mailing and of Publication directed by Order No. 1 of October 30, 1939.

Nov. 15—Petition for leave to intervene.

Nov. 21—Petition to restrain. (No. 5.)

Nov. 21—Order to Show Cause re restraint. (Order No. 5.)

1939

Nov. 27—Petition of Central Hanover Bank & Trust Company as Trustees etc. for leave to intervene.

Nov. 28—Order appointing Shelton Pitney of New Vernon and Walter P. Gardner of Jersey City, Trustees.

Dec. 7—Petition for Order instructing debtor whether it should pay taxes, etc.

Dec. 7—Order to Show Cause re taxes, etc.

Dec. 11—Order on Petition to intervene.

Dec. 13—Answer of Central Hanover Bank & Trust Co. to petition for instructions.

Dec. 13—Response of Shoenholz, Greenbaum, Wolff & Ernst and Wm. A. Roberts to Order No. 7.

Dec. 13—Affidavit of J. H. Thayer Martin.

Dec. 13—Affidavit in support of Petition for Order No. 7 by Frank M. Snyder, Comptroller of C. R. R.

Dec. 15—Answer and allegations of the State of N. J. by David T. Wilentz, Atty. General to debtor's petition for instructions.

Dec. 15—Affidavit of Owen W. Kite, Deputy Comptroller of N. J.

[fol. 2]

Dec. 15—Affidavit of Raymond M. Greer, City Comptroller of Jersey City, N. J.

Dec. 26—Order No. 11 directing debtor to pay $2,049,553.23 on account of taxes.

Dec. 26—Memorandum on debtor's petition for instructions in regard to payment to the State of New Jersey of taxes for 1939. (Fake.)

1940

Nov. 25—Petition of Trustees for instructions concerning payment of certain taxes and for Order to Show Cause.

Nov. 25—Order to show cause on petition of Trustees, etc.

Dec. 2—Order No. 72 directing Trustees to pay certain amounts on account of New Jersey State taxes, etc.

Dec. 2—Affidavit of Mailing.

Dec. 2—Affidavits on behalf of State of New Jersey.

Dec. 2—Answer of State of New Jersey.

1941

Mar. 26—Reply of claimant, State of New Jersey to Trustee's objection to tax claims.

Nov. 21—Petition of Trustees for order instructing them concerning payments to the State of New Jersey of taxes levied against the debtor and certain of its affiliated companies for the year 1941, Notice and Affidavit of Mailing.

Nov. 24—Order No. 135 instructing the trustees to pay the State of New Jersey, etc.

1942

Feb. 5—Memorandum respecting Jersey City's petition to intervene. (Fake.)

1944

Aug. 14—Petition for adjudication concerning New Jersey State Tax Claims and for order thereon, with Notice of Motion, returnable August 28, 1944.

[fol. 3] Aug. 28—Proof of Service.

Aug. 28—Special appearance of Walter D. Van Riper, Attorney General of New Jersey, etc.

Aug. 28—Hearing on petition for adjudication concerning New Jersey State Tax Claims and for order thereon. (Cal.) Ordered adjourned for three weeks. (Fake.)

Sept. 18—Hearing on petition for adjudication concerning N. J. State Tax Claims and for order thereon. Ordered continued two weeks. (Fake.)

Sept. 2 —Petition of Group of Institutional Investors, Holders of Central Railroad Company of N. J. Securities for leave to intervene with notice of motion thereon returnable October 2, 1944.

Oct. 2—Ordered hearing on petition for adjudication concerning New Jersey State Tax claims continued to October 16, 1944.

Oct. 2—Hearing on petition of Group Institutional Investors, Holders of Central R. R. Co. of N. J. Securities for leave to intervene. No opposition. Order to be signed. (F.)

Oct. 2—Petition of Group of Institutional Investors, Holders of Central R. R. Co. of N. J. Securities for leave to intervene.

Oct. 2—Order No. 249 permitting intervention of Group of Institutional Investors, Holders of Central Railroad Co. of N. J. Securities. (Fake.)

1944

Oct. 16—Ordered hearing on petition for adjudication concerning N. J. State Tax claims referred to Standing Master Augustus C. Studer. (Fake.)

Oct. 16—Order No. 250 re-referring to special master the disputed tax claims of the State of N. J. (Fake.)

Oct. 31—Notice of Appeal from order No. 250 (Copy of notice sent Wm. P. Rowland, Clerk U. S. C. C. A., The Central R. R. Co. of N. J., Shelton Pitney, Walter P. [fol. 4] Gardner, Central Hanover Bank and Trust Co., Institutional Group of Lienors, Brooks Committee of Bond holders).

Nov. 1—Order No. 252 that $250.00 be returned to Treasurer of the State of N. J. and that $250.00 be retained in the registry as a deposit by the State of N. J. for security for costs on appeal from Order No. 250.

Nov. 6—Designation of Contents of Record on Appeal.

Nov. 6—Statement of Points.

Nov. 16—Additional Designation by Trustees of debtor of Contents of Record on Appeal.

Nov. 16—Additional Designation by Institutional Group and the Trustee of the debtor's mortgage of contents of Record on Appeal.

Nov. 20—Affidavit of Mailing, Notice and Petition of trustees for order authorizing them to pay property tax and the franchise tax as finally assessed by the State Tax Commissioner for the year 1944 in accordance with the provisions of the Railway Tax Act, etc.

Nov. 20—Affidavit of mailing, Notice of Petition of trustees for order instructing them to make, on or before December 1, 1944, a further appropriate installment tender under the N. J. Tax Settlement Act.

Nov. 22—Objections of Institutional Group and the Trustee of the Debtor's General Mortgage to claim No. 38 filed by the State of New Jersey.

Nov. 22—Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey.

Nov. 27—Hearing on petition of trustees for order instructing them to make, on or before December 1, 1944, [fol. 5] a further appropriate installment tender under the N. J. Settlement Act—ordered motion granted—Ordered to be signed (Fake).

1944

Hearing on petition of trustees for order authorizing them to pay the property tax and franchise tax, etc.—ordered motion granted—order to be signed (Fake).

Nov. 27—Order No. 255 authorizing the Trustees to pay the property tax and the Franchise Tax as finally assessed by the State Tax Commissioner for the year 1944 in accordance with the provisions of the Railway Tax Act. Revised Statutes of N. J., 54:29A, and to take all appropriate action to protect the interest of the Debtor's Estate. (Fake.)

Nov. 27—Order No. 256 instructing the Trustees to make, on or before December 1, 1944, a further appropriate installment tender under the N. J. Tax Settlement Act. (Fake.)

Nov. 27—Affidavit of Service of objections of Institutional Group and the Trustee of the Debtor's General Mortgage to Claim No. 38 filed by the State of New Jersey.

Nov. 30—Petition of Trustees for an order authorizing them to pay or tender to the State of N. J. the Principal amount of taxes claimed by the State for the year 1932 and for the year 1933, etc., with affidavit of mailing.

Dec. 4—Ordered—Hearing on petition for an order authorizing Trustees to pay tender to the State of New Jersey the principal amount of taxes claimed by the State of New Jersey for the years 1932 and 1933 adjourned to December 11, 1944. (Fake.) Ordered hearing on petition of Trustees for instructions and authority to enter agreement with [fol. 6] the City of Jersey City with respect to taxes on local properties in said municipality adjourned to January 5, 1945. (Fake.)

Dec. 8—Transcript of Record on appeal sent Wm. P. Rowland, Clerk U. S. C. C. A.

Dec. 9—Notice of Motion and copy of Petition for an order granting the Attorney General of New Jersey leave to join the Trustees of the Debtor in an action to be instituted for a Declaratory Judgment.

Dec. 9—Affidavit of mailing Notice of Motion.

Dec. 11—Affidavit of mailing of supplemental and amended objections and defenses of Debtor's Trustees to claims filed by the State of New Jersey.

Dec. 11—Order No. 258 authorizing the Trustees to pay or tender to the State of New Jersey the principal amount

1944

of taxes claimed by the State for the years 1932 and 1933, etc.

Dec. 11—Hearing on petition for an order authorizing Trustee to pay or tender to the State of New Jersey the principal amount of taxes claimed by the State for the years 1932 and 1933, etc.—Motion granted—Order signed.

Hearing on Motion for Order granting Attorney General of New Jersey leave to join Trustees in action to be instituted for Declaratory Judgment—Motion denied—Order to be submitted. (Fake.)

Dec. 12—Petition of Attorney General of New Jersey for leave to join Trustees of the Debtor in an action to be instituted for Declaratory Judgment.

Dec. 12—Reply of State of New Jersey to "Supplemental and Amended Objections and Defenses of Debtor's Trustees to claims filed by the State of New Jersey.

[fol. 7] Dec. 14—Affidavit of serving Reply of State of New Jersey to supplemental and amended objections and defenses of Debtor's Trustees to claims filed by State of New Jersey. (William B. Harvey.)

Dec. 14—Affidavit of serving Reply of State of New Jersey to spplemental and amended, etc., by Benjamin C. Van Tine.

Dec. 18—Objections of Watters Committee to Claim No. 38, for $19,849,790.21 for alleged taxes and interest filed on December 10, 1940 by the State of New Jersey.

Dec. 18—Affidavit of Shelton Pitney.

Dec. 18—Hearing Motion by State of New Jersey why a Stay should not be allowed as to the hearing to be had before Standing Master to commence December 19, 1944—Ordered Motion denied. (Fake.)

Dec. 18—Order No. 260 denying petition of Hon. Walter D. Van Riper. (Fake.)

Dec. 18—Notice of Appeal from Order No. 260 (copy of Notice set Wm. P. Rowland, Clerk U. S. C. C. A., The Central R. R. Co. of New Jersey, Central Hanover Bank and Trust Co., Institutional Group of Lienors, Brooks Committee of Bondholders).

Dec. 22—Designation of contents of record on appeal from Order No. 260.

Dec. 22—Affidavit of mailing Designation of Contents of Record on Appeal.

1944

Dec. 22—Statements of Points.

Dec. 28—Letter designating portions to be sent U. S. C. C. A. for purpose of a Motion for a Stay.

Dec. 29—Affidavit of Service of Objections of Watters Committee.

Dec. 29—Reply of State of New Jersey to "Objections of Institutional Group and the Trustee of Debtor's General [fol. 8] Mortgage to Claim No. 38 filed by the State of New Jersey and affidavit of service.

Dec. 29—Reply of State of New Jersey to "Objections of Watters Committee in Support of Trustees' Opposition to Claim No. 38, etc.," and affidavit of service.

Dec. 30—Affidavit of service of Reply of State of New Jersey to Objections of Watters Committee in support of Trustees' Opposition to Claim No. 38.

Dec. 30—Affidavit of service of Reply of State of New Jersey to Objections of Institutional Group and the Trustee of the Debtor's General Mortgage to Claim No. 38.

Dec. 30—Additional Designation by Institutional Group and the Trustee of the Debtor's Mortgage of Contents of Record on Appeal from Order No. 260.

Dec. 30—Additional Designation by Trustees of Debtor of Contents of Record on Appeal from Order No. 260.

1945

Jan. 4—Designation by Trustees of Debtor of contents of record on motion to dismiss appeal from Order No. 260.

Jan. 5—Transcript of Record for Preliminary hearing on the Motion for Stay and the Motion to Dismiss Appeal from Order No. 260 sent to W. P. Rowland, U. S. C. C. A.

Jan. 8—Order amending Order No. 252 to provide for the return of the sum of $250.00 to the City of Jersey City, rather than to the Treasurer of the State of New Jersey. (Fake.)

Jan. 8—Order No. 262 providing for inclusion of Group of Institutional Investors, holders of Central Railroad Com- [fol. 9] pany of New Jersey securities, as party appellee in event of appeal by State of New Jersey from Order No. 259. (Fake.)

Jan. 10—Certified copy from U. S. C. C. A. of Order Continuing Stay to February 5, 1945.

Jan. 15—Ordered hearing on Petition of Trustee for in-

structions and authority to enter agreement with the City of Jersey City with respect to taxes on local properties in said municipality adjourned to February 26, 1945. (Fake.)

Jan. 17—Transcript of hearing before Special Master on Order No. 250, November 8, 1944.

Jan. 17—Transcript of hearing before Special Master on Order No. 250, December 19, 1944.

Jan. 17—Interim Report of Special Master.

Jan. 19—Motion of filing report of Special Master.

Jan. 22—Petition and Order No. 266 permitting suit against Trustees. (Fake.)

Jan. 24—Withdrawal of Claim No. 133.

Jan. 24—Transcript of Record on Appeal (Order No. 260) sent Wm. P. Rowland, Clerk U. S. C. C. A.

Jan. 29—Objections of State of New Jersey to Interim Report of Special Master.

Jan. 29—Affidavit of service of copy of "Objections of State of New Jersey to Interim Report of Special Master".

Jan. 30—Notice of Motion for an order adopting and confirming report of Special Master with affidavit of mailing.

Jan. 30—Supplemental Transcript of Record on Appeal from Order No. 260 sent U. S. C. C. A.

Feb. 7—Hearing on Trustees' Motion for an Order adopting and confirming report of Special Master—Ordered Decision Reserved—Briefs to be submitted. (Fake.)

[fol. 10] Feb. 16—$250.00 deposited in lieu of bond for costs on Appeal from Order No. 260.

Feb. 21—Opinion filed, (overruling objections and confirming Master's report). (Fake.)

Feb. 21—Ordered hearing on Petition of Trustees for instructions and authority to enter agreement with City of Jersey City with respect to taxes on local properties in said municipality adjourned to April 9, 1945. (Fake.)

Feb. 26—Petition for and Order No. 270 designating date and prescribing Notice of Hearing on Trustees' Petition for authority to transfer certain properties of the Debtor to a Subsidiary and to take certain other action in connection therewith. (Fake.)

Feb. 28—Notice of application to settle terms of Order No. 271 overruling objections of State of New Jersey to Interim Report of Special Master dated January 17, 1945 and confirming said report.

1945

Mar. 5—Hearing on application to settle terms of the order overruling objections of the State of New Jersey to Interim Report of Special Master dated January 17, 1945 and confirming said report—Order submitted. (Fake.)

Mar. 5—Order No. 271 overuling objections of State of New Jersey to Interim Report of Special Master dated January 17, 1945 and confirming said report. (Fake.)

Mar. 5—Memorandum on behalf of the Brooks Committee in support of Trustees' petition for order authorizing transfer of certain properties of the Debtor to a subsidiary.

Mar. 5—Affidavit of mailing Notice of Application to settle terms of Order—overruling objections of the State of [fol. 11] New Jersey to Interim Report of Special Master, etc.

Mar. 5—Minutes of Hearing—February 7, 1945.

Mar. 6—Affidavit of mailing Petition of Trustees for order authorizing them to transfer certain properties, etc., and for Order No. 270 designating date of hearing thereon and Order No. 270.

Mar. 6—Order No. 272 continuing hearing on return of Order No. 270 designating date and prescribing Notice of Hearing on Trustees' Petition for authority to transfer certain properties of the Debtor to a subsidiary, and to take certain other action in connection therewith. (Fake.)

Mar. 13—Affidavit of mailing True Copies of "Order No. 272".

Mar. 13—Hearing on Trustees' Petition for authority to transfer certain properties of the Debtor to a subsidiary, and to take certain other action in connection therewith—Adjourned to April 3, 1945. (Fake.)

Mar. 24—Notice advancing date for hearing on Trustees' petition for authority to transfer certain properties of the Debtor to a subsidiary, etc., from April 3, 1945 to March 29, 1945.

Mar. 26—Minutes of Hearing, February 26, 1945.

Mar. 26—Minutes of Hearing, March 5, 1945.

Mar. 29—Affidavit of mailing of Notice advancing date of hearing on Trustees' Petition for authority to transfer certain properties of the Debtor to a subsidiary and to take other action in connection therewith, from April 3, 1945 to March 29, 1945 at 10:30 A. M.

Mar. 29—Hearing on Trustees' Petition for authority to

1945

transfer certain properties of the Debtor to a subsidiary and [fol. 12] to take certain other action in connection therewith—Decision reserved—Briefs to be filed.

Apr. 2—Affidavit of Mailing, filed.

Apr. 2—Notice of Appeal by the State of New Jersey, filed copies sent to Wm. P. Rowland, Clerk U. S. C. C. A., Central Railroad Company, Shelton Pitney, Walter P. Gardner, Central Hanover Bank and Trust Co., Institutional Group of Lienors, Brooks Committee of Bondholders, Watters Committee of Bondholders.

IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

PETITION

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of the State of New Jersey respectfully shows that:

1. On October 30th, 1939, the Central Railroad Company of New Jersey, a corporation of the State of New Jersey, hereinafter refered to as the Debtor, filed its petition with the District Court of the United States for the District of New Jersey under Section 77 of the Bankruptcy Act. According to the Trustees of the Debtor such action was taken because the State of New Jersey had threatened to enter judgment and sell properties of the Debtor, located within the State, for nonpayment of 1932 and 1933 taxes, litigation concerning which had resulted unfavorably to the Debtor as reported in 100 Fed. (2nd) 139, Certiorari denied 306 U. S. 651, rehearing denied 306 U. S. 669.

[fol. 13] 2. At the time of the filing of the said petition, the Debtor owed balances on its tax debt to the State for the tax years 1932 to 1939 inclusive, all of which balances were liens paramount to all other liens upon all the lands and tangible property and franchises of the Debtor in the State (R. S. 54:27-4), the latest lien having attached for 1939 taxes on June 1st, 1939.

3. The fiscal officers of the State were enjoined by the action of the District Court from proceeding to enforce

any of the tax liens in and to the said lands and tangible property and franchises of the Debtor.

4. When the District Court took custody of the properties of the Debtor upon the filing of the petition, the Court took such custody subject to all of the liens of the State of New Jersey in and to such properties. When the Trustees took title upon their qualification on January 8th, 1940, they took only that interest which is Debtor had just prior to the filing of its petition and which the Court took into its custody on October 30th, 1939.

5. There was on January 8, 1940, no New Jersey statute which gave consent to the Trustees to bring the property rights of the State as represented by its tax liens for the years 1932 to 1939 inclusive, within the jurisdiction of the Bankruptcy Court nor was there any statute authorizing the enforcement of such tax liens in such Court on such date. No such statute has been enacted in the meantime. As of the said January 8th, 1940, the Bankruptcy Court was without authority to make any adjudication concerning the amount and validity of the said tax liens.

6. In 1940 this Court determined adversely to the Debtor litigation involving the 1934, 1935 and 1936 assessments. Judge Maris in an exhaustive opinion reported in 115 [fol. 14] Fed. (2nd) 968 held that the matters had been made *res adjudicata* by the New Jersey Supreme Court in *Central Railroad Co.* v. *Martin*, 114 N. J. L. 69.

7. Thereafter the Comptroller of the State of New Jersey filed with the Bankruptcy Court certain proofs of claims on forms furnished by the Trustees. Such proofs of claim set forth that "the statute of New Jersey provides that these taxes shall be a lien paramount to all other liens upon all the lands, tangible property and franchise of the Company in the State (Section 9, Chapter 208, P. L. 1888, as amended and supplemented; Section 54:27-4 Revised Statutes). The lien shall take effect on June 1 of the year in which the tax is payable."

8. The Trustees now allege that the said filing of the proof of claim by the Comptroller of the State constituted a demand upon the Trustees for payment of the full amount of the tax debt from the estate of the Debtor and that the Trustees are therefore authorized to inquire into the amount

and validity of the State's tax liens. Such a conclusion can only be reached upon the assumption that the estate of the Debtor comprises all of the lands, tangible property and franchises of the Debtor within the State and that it is incumbent upon the State to prove its tax liens before it may share in such estate. The Trustees misconstrue the meaning of the term estate, which is taken into the custody of the Court by the institution of the bankruptcy proceedings.

9. The State of New Jersey urges: (a) Since its tax liens were attached long before the filing of the petition in bankruptcy the estate of the Debtor comprises the properties in the State of New Jersey subject to such liens and before any adjudication may be made concerning such liens, that will be binding on the State, the Bankruptcy Court [fol. 15] must bring into the Court the *res* which is represented by the said tax liens.

(b) To accomplish this result the moving party, the actor, must be the Trustee.

(c) The Trustee in such a case would be compelling the State to engage in litigation, which would in effect amount to a suit against the State which can not be maintained because the State has not consented thereto.

(d) Since the Trustee only had custody of the estate of the Debtor (the equity of the Debtor over and above the State's tax liens), when the Comptroller filed his proof of claim, he could have only intended to make demand upon that portion of the estate upon which the State had no lien.

(e) Since it is fundamental in the law of bankruptcy that one may not make demand against the general or unsecured assets of a Debtor until he has exhausted his security, the Comptroller could at most be deemed to have made demand against the general or unsecured assets for any deficit that might occur upon a sale of the liened properties. Since the said property is apparently worth considerably in excess of the tax debt, it would be the only means of laying the basis for a future possible demand against general assets because the Court had by its restraint made it impossible to prove at this time the adequacy of the security.

(f) If the Comptroller did intend to submit the tax liens of the State to the jurisdiction of the Bankruptcy Court,

the State alleges that he was not authorized to do so either by express provision of statute or by reason of any implied power contained within his broad general powers.

[fol. 16] (g) Notwithstanding the Comptroller did so intend, the State of New Jersey may raise the question of his lack of power at this time (*See Ford Motor Company* v. *Dept. of Treasury of Indiana*, 65 Sup. Ct. Rep. 347 (January 8, 1945)). The State may not be bound by unauthorized action of its officers.

10. Notwithstanding the termination of the 1932 and 1933 litigation by this Court as reported in 100 Fed. (2nd) 139 (cert. den. 306 U. S. 651), and of the 1934, 1935 and 1936 cases as reported in 115 Fed. (2nd) 968, (cert. den. 313 U. S. 568), adversely to Debtor, the said Debtor continued, in company with certain other railroads acting together, to owe large sums of money upon its tax debts for such years. The railroad companies were finally successful in having legislation passed whereby the interest charges, which had accrued because of their defaults, were sought to be forgiven—chapters 290 of the laws of 1941 and 241 of the laws of 1942, hereinafter called the Settlement Acts. The Attorney General of New Jersey conceiving such acts to be unconstitutional filed an information in the Court of Chancery of New Jersey as a result of which the State Treasurer was first temporarily and thereafter permanently enjoined from accepting any payments under the said Settlement Acts, the Court holding that such acts were unconstitutional in *Wilentz* v. *Hendrickson*, 133 N. J. E. 447 (Ct. of Ch. 1943), affirmed by the Court of Errors and Appeals in 135 N. J. Eq. 244.

11. During the course of the last mentioned litigation the Trustees prevailed upon the District Court to make its order No. 163 whereby the obligation of the Debtor to the State of New Jersey was fixed in the amount provided by the Settlement Acts. On appeal to this Court, the said order was set aside. (*In re Central Railroad Co.*, 136 Fed. [fol. 17] (2nd) 633.) Nothwithstanding the clear expression of this Court, the Trustees made no effort to intervene in the New Jersey Chancery proceedings.

12. Shortly after the Court of Errors and Appeals made its determination (135 N. J. Eq. 244), the Trustees filed their petition of August 12, 1944, praying the Bankruptcy

Court among other things to adjudicate "the relative rights, claims, liens and priorities" in the assets of the Debtor's estate.

13. The Attorney General filed a special appearance and moved that the petition be dismissed "insofar as the liens of the State for taxes and interest are sought in any wise to be altered, affected, modified or destroyed."

14. The District Judge refused to pass upon the jurisdictional question but referred the same along with all of the meritorious questions contained in the petition of August 12th to a Special Master for report and recommendation by Order No. 250. The State has appealed from that order and the same is pending. The State in its brief has alleged that the District Court did in fact take jurisdiction. The Trustees in their answering brief have refused to accept the challenge on jurisdiction and have limited their argument to points other than the troublesome problem that it is now sought to have determined. The termination of appeal from Order 250 will in all probability accomplish no more than a modification of the said Order to require the District Court to comply with the accustomed practice that jurisdictional questions be disposed of before proceedings with questions on the merits.

15. Shortly thereafter and long before any attempt was made to consider the jurisdictional matter and notwithstanding the Court's insistence that he had not passed [fol. 18] upon the jurisdictional question, the Court by its Order No. 259, over the objection of the State, provided for the selling of certain liened property, free and clear of the liens, a proceeding which requires jurisdiction of the person of the lien holder. Several other orders were also entered intended to be binding on the State.

16. It then becoming apparent that the Special Master intended to proceed with matters having to do with merits including those involving the Constitutionality of the Settlement Acts insofar as they concerned the Debtor, notwithstanding the views expressed by this Court in *In re Central Railroad Company*, 136 Fed. (2nd) 633, regarding the exercise of a nice discretion, the Attorney General, gave notice that he would move the Court for permission to join the Trustee in a declaratory judgment action to determine whether the Settlement Acts were constitutional

as to the Debtor. The petition of the Attorney General provided "saving in all respects objections heretofore made to the jurisdiction of this Court with respect to the tax debt liens of the State of New Jersey." It was filed on the assumption that the Court had jurisdiction—this being the only way the Attorney General could adequately protect the interests of the State since he had been denied an answer to his jurisdictional objections. Since the Settlement Acts had been tested by means of an information in the name of the Attorney General, it was intended to have a corresponding proceeding as being most likely to achieve the result of having the existing New Jersey Chancery Court injunction lifted in the event the Debtor was succesful. In the course of the several discussions, it was suggested to the Court, that since the constitutional question was being raised, he of his own motion should direct the Trustees to institute an appropriate State Court proceeding if the remedy suggested by the Attorney Gen- [fol. 19] eral was unsatisfactory. Mandamus was suggested as a possibility. Notwithstanding the District Court Judge had the benfit of *Spector Motor Service* v. *McLaughlin*, 99 L. Ed. 105 (U. S. Supreme Court, December 4, 1944), wherein the Supreme Court cited with approval this Court's opinion in *In re Central Railroad*, 136 Fed. (2nd) 633, having to do with this very subject matter and wherein it is reported the Supreme Court of its own motion and without any application being made by any party referred the matter back to the State Court for disposition of matters of local law, the Court by its Order No. 260 denied the application and made no counter proposal, retaining the matter instead in the hands of the Special Master where at present testimony is being taken on matters that are properly those for the State Courts.

17. The State has taken an appeal from order No. 260, although such appeal will be unecessary if it shall be determined that the Bankruptcy Court does not have jurisdiction of the property rights represented by the liens of the State of New Jersey.

18. Thereafter, on December 19th, the Special Master started hearings. It was stated that the jurisdictional question would be considered first. The attorney for the Trustees put in certain matters having to do with certain actions of State officers in connection with the bankruptcy

proceedings; also similar matter in connection with the bankruptcy proceedings of the Erie Railroad Co. and its affiliates and subsidiaries, which occurred in about the same period, similar papers in most cases having been signed by the same Comptroller and Attorney General. When the first witness was put on and asked his first question the State was informed upon inquiry that the jurisdictional case was in and the case on the merits had commenced. Not one single witness was needed to support the [fol. 20] Trustees jurisdictional case which had been referred with all other matters by order No. 250. Less than two hours was consumed in putting in the above mentioned records.

As a result of protest, argument was heard on the jurisdictional question but the State was informed that the Special Master would proceed with the case on the merits upon the following day and before he had determined whether in his opinion the Court had jurisdiction.

19. The State believing that it was entitled to have the matter stayed pending a final determination of the jurisdictional objections and because the Court upon the making of order No. 260 (re constitutionality of Settlement Acts), had refused to grant a stay pending an appeal from said order No. 260, but on the contrary it was the present purpose of the Special Master to proceed with all the meritorious questions including a retrial of the issues of constitutionality having to do with the Settlement Acts, applied for and obtained a temporary stay on December 19th pending application to this Court for a stay pending the termination of the two appeals. Argument was heard on February 5th at which time this Court denied the requested stay.

20. In the meantime, the Master on January 17th, 1945, made an interim report wherein he held that in his opinion the Court had jurisdiction over the matter of the tax claims of the State. He failed to pass specifically upon the allegation of the State that the property rights of the State as represented by its liens upon the land, tangible personal property and franchises of the Debtor are not comprised within the assets of the Debtor now in the custody of the Court and its Trustees. He failed to answer the State's contention that the assets of the Debtor are only that equity which the Debtor had in and to such property and that the

Trustees could not obtain service upon the State or bring [fol. 21] its rights in such property within the jurisdiction because the State had not consented thereto.

21. The State filed objections to the report of the Special Master, calling attention to the fact that the Master had not fairly met the issues presented by the State's denial of jurisdiction in the Bankruptcy Court to make any adjudications that are intended to be binding on the State concerning its liens in and to the properties of the Debtor located in the State of New Jersey. In oral argument before the District Judge on February 7th the State earnestly requested a clear cut determination of this vital issue.

22. Notice was received thereafter that the Special Master would proceed with hearings on the merits, including the constitutional questions, on February 23rd, this notwithstanding the District Judge had made no determination of the jurisdictional objections. On Tuesday, February 20th, this was called to the attention of the Special Master who suggested that the State's representative see the Judge but that it was his intention to go forward.

23. The Deputy Attorney General conferred with Judge Fake that same day; the Judge said that he had not had time to give the matter his consideration. The Judge was informed that the State deemed that it was unseemly that the Master should insist upon proceeding before the Court had made its determination of the jurisdictional question. One day later the Judge informed the State that he had determined that he did have jurisdiction. In a very short finding, he confirmed the Master's interim report, but as in the case of the Master, he assiduously refrained from passing on the specific questions raised by the State (a) that it has a lien interest in the property of the Debtor which was affixed prior to the institution of the Section 77 bankruptcy proceedings, concerning which lien interest no [fol. 22] adjudication could be made by the Bankruptcy Court without the consent of the State and (b) that any attempt to make any such adjudication constituted a suit against the State in violation of its constitutional immunity.

24. The State of New Jersey has not raised the jurisdictional question to harass, hamper or delay. It is the reasoned judgment of the proper officers of the State

government that unless somewhere along the line legal precedents of long standing are upset, the State must finally prevail on its jurisdictional issue. No authorities have been cited by the District Judge in refutation of the State's position concerning its lien interest. The State believes there are no such authorities.

25. If and when the Court has entered its order denying the State's jurisdictional motion, an appeal will be taken from such order, hereinafter designated as Order X. But again although the State may argue that the Court should have found that there is no jurisdiction in the Court to adjudicate concerning its tax liens and although because of the objections of the State and the argument presented, this Court might well dispose of the jurisdictional question on appeal, it is conceivable that so many technical arguments might be advanced so that this Court might well set the said Order X aside and send the matter back for the further action of the District Court. The difficulty that the State has experienced since August 12th, 1944, in getting this very narrow jurisdictional question answered should compel resort to some remedy that will make such course unnecessary.

26. Also, the several matters are in such shape now, through no fault of the State and solely because the District Court had refused to answer the jurisdictional question before trying to go forward on meritorious matters, where [fol. 23] the appeal from Order No. 260 will be heard before the appeal from Order No. X with result that, if the Court should find with the State on its appeal from the said Order No. 260, as it surely must under the doctrine of the *Spector Motor Co.* v. *McLaughlin* case, *supra*, and *In re Central Ry. Co., supra*, and then should find for the State on its jurisdictional question on the appeal from Order No. X, the appeal from Order No. 260 would have become just sheer waste.

27. The only way to put the several matters in some semblance of order is by the use of a writ of prohibition whereby the question of jurisdiction may be more expeditiously disposed of. This remedy was not originally resorted to because of the rule that the writ will ordinarily not issue when there is an adequate remedy by appeal and because the State expected the Court would follow the

usual practice of first disposing of the jurisdictional question. The State has now exhausted its effort to have the jurisdictional question fairly answered so the question may be finally presented to this Court for review. This case is not dissimilar to *Ex parte New York*, 256 U. S. 490, wherein the Court in allowing the writ of prohibition held that an appeal from final judgment was not a sufficiently adequate remedy to warrant the denial of the extraordinary remedy of prohibition to a sovereign state invoking its sovereign immunity from suit.

28. The use of the remedy of prohibition has the additional advantage that if the writ should be allowed, the determination of the jurisdictional question will finally dispose of the matter contained in the appeals from Orders No. 250 and No. X, having to do with jurisdiction, and from Order No 260, which was the result of an application made on the assumption of jurisdiction. If the writ is denied on [fol. 24] the basis that the Court does have jurisdiction, such determination will dispose of the subject matter of the appeal from Orders No. 250 and No. X. It will only be necessary to go forward with the appeal from Order No. 260, concerning the reference of the State constitutional question to the State Courts.

29. The State had been of the opinion that it was entitled to a stay of all proceedings having to do with the amount and validity of its tax liens affixed at the inception of the bankruptcy proceedings, pending the determination of its jurisdictional objections. Had this Court not refused such a stay after lengthy argument, such application would be made at this time in connection with the issuance of a rule to show cause, because the State has believed that it should not be compelled to assume again the tremendous expense of re-litigating matters that this Court on appeal will surely hold have long since been made *res adjudicata*. However, the State defers to the former ruling and will not here request a reconsideration. This observation is made so that the Court may understand the reason why such application is not made.

30. Since, however, the State is being compelled by the District Court to go forward on such questions long since declared by this Court to be *res adjudicata* and since the State is being forced to litigate on matters which this

Court has said should in the exercise of a nice discretion be referred to the State Courts and which this Court on appeal would surely on its own motion refer back for such disposition, and since the State has exhausted every resource at its command to have an early determination whether its property rights are within the jurisdiction of the Bankruptcy Court, the only effective remedy left to the State is this application for a writ of prohibition. Thereby [fol. 25] the State seeks to review the whole question of the power of the Bankruptcy Court to adjudicate concerning the property rights of a State as represented by its tax liens which were affixed prior to the institution of bankruptcy proceedings and thus to assume once more that working arrangement that must obtain if the State government and the federal courts are to function within the same limits as a harmonious whole, that which our highest Court has so often mentioned. On such a review the State asserts that it will prove that the District Court's assumption of jurisdiction constitutes an usurp-tion. If this is done, an expense to which the State is now being put in the preparation of what will be a voluminous, expensive record will be spared.

31. The State calls to the attention of the Court that, the first time that the Trustees sought to have the District Court adjudicate concerning the amount and validity of the State's tax liens, the State interposed its objections. This was done before the Trustees were put to the expense of proving their case. We are not in the position of the Attorney General in *Ford Motor Company* v. *Dept. of Treasury of Indiana*, 65 Sup. Ct. Rep. 347 (January 8, 1945) where the jurisdictional question was raised for the first time in the U. S. Supreme Court, and yet the State's plea to immunity was allowed. It may not be said that we have come at a late date to urge our sovereign immunity.

Wherefore, your petitioner, the State of New Jersey, does pray that a writ of prohibition may issue out of and under the seal of this Honorable Court directed to the District Court of the United States for the District of New Jersey, the Honorable Guy L. Fake, District Judge and the Honorable Augustus C. Studer, Special Master, forbidding and preventing them or any of them from proceeding with the determination of any matters or the making of any

[fol. 26] adjudication in connection with the tax debt liens of the State of New Jersey for the years 1932 to 1939, inclusive, in and upon the lands, tangible personal property, and franchises of the Central Railroad Company of New Jersey, Debtor, presently undergoing reorganization proceedings in the said District Court under Section 77 of the Bankruptcy Act, insofar as it is intended that any such determination or adjudication is intended to be binding upon the State of New Jersey.

And your petitioner will ever pray.

State of New Jersey, By Walter D. Van Riper, Attorney General.

Dated: February 26th, 1945.

STATE OF NEW JERSEY,
County of ——, ss.:

Benjamin C. Van Tine, of full age, being duly sworn according to law, upon his oath deposes and says:

I am Deputy Attorney-General of New Jersey and charged with the handling of all matters connected with the proceedings in the United States District Court for the reorganization of the Central Railroad Company of New Jersey, Debtor under Section 77 of the Bankruptcy Act. I have read the foregoing petition of the State of New Jersey and the matters and things set forth therein are true, except where alleged to be on information and [fol. 27] belief, and as to those matters, they are true to the best of my knowledge, information and belief.

Benjamin C. Van Tine.

Sworn and subscribed to before me, this — day of February, 1945. Alice E. Carroll, Notary Public of New Jersey.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER TO SHOW CAUSE

Present: Biggs, Maris and Goodrich, Circuit Judges.

Upon consideration of the petition of the State of New Jersey by Walter D. Van Riper, Attorney General, filed herein,

A Rule is granted upon Honorable Guy L. Fake, Judge of the District Court of the United States for the District of New Jersey, and the other Judges of the said Court, and upon Augustus C. Studer, Esquire, as Special Master appointed by the said Court, to show cause why a writ of prohibition should not issue as prayed for.

Said Rule being returnable April 2, 1945.

By the Court, John Biggs, Jr., Circuit Judge.

March 9th, 1945.

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS

ANSWER OF GUY L. FAKE, ONE OF THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

I, Guy L. Fake, one of the Judges of the District Court of the United States for the District of New Jersey, in obedience to the order of this Court dated the 9th day of March, 1945, directing me, the other Judges of said Court, and the Special Master, Augustus C. Studer, Jr., to show cause why a writ of prohibition should not issue as prayed for, do hereby certify and make to this Honorable Court the following answer in behalf of myself, the other Judges of said Court, and the Special Master, Augustus C. Studer, Jr.

1. On October 30, 1939 The Central Railroad Company of New Jersey, Debtor, a railroad engaged in interstate commerce, filed in the United States District Court for the District of New Jersey a petition under and by virtue of the provisions of Section 77 of the Bankruptcy Act, 11 U. S. C. A. Sec. 205. On the same day an order approving the petition as filed was signed by me and entered and I have ever since been the Judge of said Court in charge of said reorganization proceedings No. 29,778. The State of New Jersey thereupon appeared before me in said

proceedings, filed proofs of claim for State taxes and at divers times and by divers means has pressed its claims in the proceedings and asserted a preferred and lien position as such tax claimant, as hereinafter more fully set forth.

2. Recently, however, the State of New Jersey has challenged the jurisdiction of the District Court of the United States for the District of New Jersey to pass upon the State's tax claims so filed by it in said proceedings. The single jurisdictional question raised by the State has [fol. 29] been based exclusively on the well recognized principle that a sovereign state may not be sued without its consent.

3. It has therefore seemed that if no suit or action of any kind against the State has in fact been instituted, the State's motion addressed to the jurisdiction of the bankruptcy court to consider the State's tax claims should be overruled.

4. By Order No. 250 entered in the reorganization proceedings on October 16, 1944 I referred said jurisdictional objection or plea of sovereign immunity to the standing Special Master designated and appointed pursuant to said Section 77.

5. On January 17, 1945 the Master filed his report concerning said jurisdictional objection. A copy of said report is annexed to this answer as Exhibit A. The Master reported, *inter alia*, that in his opinion "the claim of the State to sovereign immunity should be denied".

6. The State filed objections to the Master's report and said objections were argued before me on February 7th, 1945. On February 21st, 1945 I filed a memorandum opinion wherein I expressed approval of the Master's report. A copy thereof is annexed to this answer as Exhibit B.

7. On March 5th, 1945 I signed and caused to be entered in the proceedings Order No. 271, to effectuate the conclusions expressed in said memorandum opinion. A copy of Order No. 271 is annexed hereto as Exhibit C.

8. The record in the reorganization proceedings does not disclose that the Trustees of the Debtor or any other

party to said proceedings have instituted any action or [fol. 30] suit of any kind, either *in personam* or *in rem*, against the State of New Jersey.

9. No party to the proceedings has challenged the principle of sovereign immunity or the principle that the custody and title of the Trustees of the Debtor of and to the estate *in custodia legis* is subject to preexisting liens. However, the added and extended concept advanced on behalf of the State has been challenged, viz., the concept that the estate *in custodia legis* consists of "only the interest of the Debtor *over and above*" liens and that "the court has only that equity which the Debtor had immediately prior to the inception of the proceedings". It is that argument or concept which has been rejected by said Order No. 271 and, as well, the assumption that the quantum, rank and extent of security of a lien claim asserted by a state must be accepted and the lien claim allowed exactly as set forth by the State in its proof of claim and without any scrutiny or determination by the Bankruptcy Court of any issues raised with respect thereto by the Trustees and other parties to the reorganization proceedings.

10. An appeal from Order No. 271, if taken, will review and permit disposition of the jurisdictional question decided by me. The State's petition for a writ of prohibition expresses the State's intention to take an appeal from said Order No. 271. It is most respectfully suggested to your Honorable Court that it is here being asked to disregard and by-pass its appellate jurisdiction to review Order No. 271 dated March 5, 1945—which adjudicated that no suit against the sovereign State of New Jersey is involved and accordingly overruled the State's plea of sovereign immunity from suit—and to give original consideration to that same plea under its show cause order of March 9, 1945 why the extraordinary remedy of prohibition should not be granted; and that a writ of pro- [fol. 31] hibition will not be issued except in extraordinary cases or where there is no other remedy available.

11. As hereinbefore indicated, the State of New Jersey has actively participated in the reorganization proceedings from their inception and has zealously asserted and protected its rights as a tax claimant. The State appeared before me by its Attorney General and nominated a pros-

pective trustee at the hearing held on November 27th, 1939 for the purpose of considering the selection of trustees. It also appeared before the Interstate Commerce Commission on the hearing held on December 12th, 1939 to consider the confirmation of the trustees appointed by me. It has also appeared generally and was heard on divers other occasions as, for instance, before the District Court at a hearing held on June 12, 1940, on the Trustees' petition for Order No. 53 authorizing the Trustees to pay monthly installments on account of the taxes assessed against the property of the Debtor for the years 1932 and 1933. At that hearing the Attorney General urged the Court to require the Trustees of the Debtor to pay not less than $1,200,000 on account of the alleged unpaid balance of taxes assessed against the Debtor's property for the years 1932 and 1933. The Court subsequently entered Order No. 53 authorizing the Trustees to pay $150,000.00 per month for six months on account of the taxes assessed for those years. Said payments amounting in the aggregate to $900,000 were made by the Trustees of the Debtor and were accepted by the Treasurer of the State of New Jersey.

12. By Order No. 66 in the reorganization proceedings dated October 7, 1940 I required the claims of all creditors "including all claims of whatever character" against the Debtor "or its property" to be filed by December 31, 1940 in the form and manner prescribed by that Order.

[fol. 32] 13. On December 11, 1940 the State of New Jersey filed its proofs of claim (Nos. 34-38) for alleged 1932-1939 tax balances, in the form prescribed by said Order No. 66.

14. On March 3, 1941 the Trustees filed objections to said proofs of claim.

15. On March 26, 1941 the State of New Jersey filed its "Reply of Claimant, State of New Jersey, to Trustees' Objections to Tax Claims".

16. By Order No. 93 dated April 1, 1941 I referred all disputed claims to the standing Special Master "together with all objections thereto, for hearing and report thereon". Hearings on said claims Nos. 34-38 inclusive had not commenced when on July 22, 1941 Chapter 290 of the Laws of New Jersey of 1941 entitled "An Act relating to the collec-

tion of certain delinquent taxes upon railroad companies" was enacted and became effective. This act was later amended by Chapter 241 of the laws of 1942 (For act as amended see 58 N. J. S. A. Cum. Pocket Supp. Sections A:4—7.1 to 7.16 inclusive.)

17. Litigation ensued which resulted in deferment of consideration of the State's tax claims for approximately three years and until the entry of Order No. 250 dated October 16, 1944 to which reference has hereinbefore been made. See *Wilentz* v. *Hendrickson*, 135 N. J. Eq. 244, affirming 133 N. J. Eq. 447. And see also *In re Central Railroad Company of New Jersey*, 136 F. (2d) 633.

18. The narrow jurisdictional issue has been here set forth as it was presented and argued before me, as of possible convenience to the Court on the return of its order to show cause dated March 9, 1945. I respectfully refrain [fol. 33] from making answer to so much of the petition herein as discusses the merits of the State's tax claims as set forth in its proofs of claim, because the merits have not yet been argued, considered or adjudicated.

19. If it be necessary for respondents to be formally represented by counsel before your Honorable Court, Shelton Pitney, Esq., is hereby appointed as such counsel.

20. On behalf of myself and the other respondents to the order to show cause dated March 9, 1945 I pray that said order may be discharged and that we may henceforth be dismissed.

In witness whereof, I, Guy L. Fake, one of the Judges of the District Court of the United States for the District of New Jersey, have hereunto set my hand and the seal of said Court on this 2d day of April, 1945.

Guy L. Fake, United States District Judge. (Seal of the Court.)

[fol. 34] EXHIBIT "A" TO ANSWER

On Order No. 250 re-referring to Special Master the disputed tax claims of the State of New Jersey, all existing or additional objections thereto and the State's reply to said objections and also referring the State's motion to dismiss the Trustees' petition, dated August 12, 1944, for an adjudication of said claims.

Interim Report of Special Master

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

Augustus C. Studer, Jr., Special Master, hereby reports to this Court as follows:

By Order No. 250, heretofore made herein under date of October 16, 1944, all tax claims filed by the State of New Jersey, the Trustees' objections thereto and the State's reply to said objections and, also, the purported special appearance of the State of New Jersey objecting to the jurisdiction of this Court, which special appearance was filed herein on August 28, 1944, were referred to the undersigned Special Master for hearing and report thereon.

Pursuant to that order, the matter came on to be heard before the Master on Tuesday, December 19, 1944, in the presence of the following:

Shelton Pitney, Esquire and Walter P. Gardner, Esquire, Trustees of the Debtor;

Benjamin C. Van Tine, Esquire, Deputy Attorney General of the State of New Jersey and Milton B. Conford, Esquire, of Counsel;

Willard P. Scott, Esquire and Blair Reiley, Esquire, for Institutional Bondholders;

[fol. 35] White and Staples, Esquires and Edwin M. Slote, Esquire, of Counsel, by Robert Carey, Esquire and Edwin M. Slote, Esquire, for the Watters Committee; and

Reynier J. Wortendyke, Jr., Esquire, for the Central Hanover Bank and Trust Company, Trustee of the Debtor's Mortgage.

It was agreed by counsel that the question of the Court's jurisdiction to hear and report on the tax claims of the State of New Jersey would be heard first and an interim report filed by the Master on that question. (See Transcript, p. 68.)

This report deals only with the question of the jurisdiction of this Court to hear and determine, without the consent of the State of New Jersey, the tax claims filed by the State of New Jersey herein.

Considered in this report and submitted with it are:

(1) The petition, dated August 12, 1944, of Shelton Pitney and Walter P. Gardner, Trustees of the properties of

the Debtor herein, for adjudication concerning New Jersey State tax claims heretofore filed herein.

(2) Special appearance filed herein under date of August 28, 1944, of Walter D. Van Riper, Attorney General of the State of New Jersey, for the sole purpose of objecting to the jurisdiction of the Court to entertain petition for adjudication concerning New Jersey State tax claims and for Order No. 250;

(3) Proofs of claims Nos. 34, 35, 36, 37 and 38, filed by the State of New Jersey herein;

(4) Objections to proofs of claims Nos. 34, 35, 36, 37 and 38, filed by the Debtor and its Trustees;

(5) Reply of claimant, State of New Jersey, to Trustees' objections to tax claims;

[fol. 36] (6) Supplemental and amended objections and defenses of Debtor's Trustees to the claims filed by the State of New Jersey;

(7) Reply of State of New Jersey to Supplemental and amended objections and defenses of Debtor's Trustees to claims filed by the State of New Jersey;

(8) Objections of Watters Committee, dated December 18, 1944, in support of Trustees' opposition to Claim No. 38 for $19,849,790.21, for alleged taxes and interest, filed on December 10, 1940, by the State of New Jersey in these proceedings;

(9) Reply of State of New Jersey, dated December 29, 1944, to objections of Watters Committee in support of Trustees' opposition to Claim No. 38 for $19,849,790.21, for alleged taxes and interest, filed on December 10, 1940, by the State of New Jersey in these proceedings;

(10) The brief filed herein on behalf of Walter D. Van Riper, Attorney General of New Jersey, appearing specially;

(11) Trustees' brief, filed herein in opposition to motion to dismiss the petition of the Trustees;

(12) Memorandum of Institutional Group and the Trustees of the Debtor's general mortgage in opposition to motion of Walter D. Van Riper, Attorney General of the State

of New Jersey, to dismiss Trustees' petition for adjudication regarding New Jersey State Tax Claims;

(13) Reply of State of New Jersey, dated December 29, 1944, to objections of Institutional Group and the Trustee of the Debtor's general mortgage to Claim No. 38 filed by the State of New Jersey;

(14) The transcripts of the testimony taken at the hearings before the Master on November 8, 1944 and December 19, 1944;

[fol. 37] (15) The exhibits offered at the hearing before the master on December 19, 1944.

The Trustees of the Debtor filed objections and supplemental and amended objections and defenses to the claims filed by the State of New Jersey herein and also filed their petition for adjudication concerning the New Jersey State tax claims hereinabove referred to, in which, among other things, they prayed (Petition, p. 24) that this Court adjudicate "to what extent, if at all, the proofs of claim of the State of New Jersey should be allowed". Other prayers are contained in that petition, but the prayer last above quoted is the only one substantially involved in this report, because at the hearing before the Master the question was presented and argued by counsel on that basis.

The State of New Jersey, by its Attorney General, specially appearing, contends that it was not the intention of Congress, by Section 77 of the Bankruptcy Act, to confer upon this Court power "to make an adjudication that will be binding upon the sovereign State of New Jersey concerning the amount of the tax debt that is due and payable to the State, which is a paramount lien upon the properties of the Debtor within its boundaries, or an adjudication in anywise concerning or affecting such liens" (Brief, p. 1); also, that if the act be so construed, it is unconstitutional, as violating the State's sovereign immunity from suit under the Eleventh Amendment to the Constitution (Brief, p. 16); also, that Section 64 (a) of the Bankruptcy Act does not confer such power upon this Court in this proceeding, because the claims of the State herein are secured by liens (Brief, p. 20).

The constitutional immunity of the State of New Jersey from a suit in a Federal Court, without its consent, is admitted as a general proposition.

On behalf of the State, both in the brief filed by the Attorney General and in the argument made at the hearing, [fol. 38] it was vigorously contended that the Comptroller of the State of New Jersey, in verifying the proofs of claims in these proceedings, which were filed in the name of the State of New Jersey as claimant, by so doing, did not and could not waive any immunity from suit which the State of New Jersey had.

The Trustees maintain that they are defending the debtor's estate against the State's claims; that the State is the claimant and actor; that here is a fund in Court—an estate *in custodia legis*—in which the State claims an interest and against which it asserts its claims (Trustees' brief, p. 2). They maintain further that they resist, but seek no recovery from the State and assert no right, title or interest in and to any property of the State; they say their petition herein reveals certain of their defenses to the State's proofs of claim, including defenses which have arisen since their original objections were filed and that it supplements the defenses stated in those objections (Trustees' brief, p. 2).

From the testimony taken at the hearing before the Master and the exhibits then marked in evidence, the Master makes the following findings of fact:

(1) The State's proofs of claim in these proceedings, numbered 34, 35, 36, 37 and 38, were filed in the name of the State of New Jersey as Claimant. They were signed and verified by Frank J. Murray, "Comptroller of the Treasury of New Jersey". They designated David T. Wilentz, Attorney General, State House, Trenton, New Jersey, as "Attorney Authorized to Represent Claimant" and on their backs the following appears: "Claim of State of New Jersey, David T. Wilentz, Attorney for Claimant, Address: State House, Trenton, N. J." In the body of each of those claims, Paragraph (4) says:

> "(4) Security or lien, if any, for said claim: Answered in (10) below:

[fol. 39] Also, in the body of each of those claims, Paragraph 10 says:

> "(10) Lien, priority or preferential classification, if any, claimed for the claim, or any part thereof,

the reasons therefor and full statement of the facts respecting same:

"The statute of New Jersey provides that these taxes shall be a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this State (Section 9, Chapter 208, P. L. 1888, as amended and supplemented; Section 54:27-4, Revised Statutes). The lien shall take effect on June 1 of the year in which the tax is payable."

(2) The Trustees filed objections in the proceedings to proofs of claim Nos. 34, 35, 36, 37 and 38.

(3) The State of New Jersey filed in these proceedings Reply of Claimant, State of New Jersey, to Trustees, objections to tax claims (Nos. 34, 35, 36, 37 and 38). That reply was signed "David T. Wilentz, Attorney General, Attorney for Claimant, State of New Jersey, State House, Trenton, New Jersey;"

(4) A petition was filed by the State of New Jersey in the Erie Railroad reorganization proceedings then pending in the District Court of the United States for the Northern District of Ohio, Eastern Division, for leave to file its claim against the Trustees for the unpaid balance of taxes and assessments for the years 1939 and 1940, inclusive. That petition was signed "David T. Wilentz, Attorney General, State House Trenton, New Jersey, Spieth, Taggert, Spring & Annat, By Paul H. Keough, of Counsel, 1568 Union Commerce Building, Cleveland, Ohio. Attorneys for Claimant, State of New Jersey" (Exhibit T-8, December 19, 1944):

[fol. 40] (5) Order No. 404, filed February 28, 1942, was made by R. N. Wilkin, District Judge, in the said reorganization proceedings of the Erie Railroad authorizing the State of New Jersey to file its claim for 1939 and 1940 taxes (Exhibit T-9, December 19, 1944);

(6) In the said reorganization proceedings of the Erie Railroad Company a proof of claim was filed in which the State of New Jersey was the claimant. That claim was signed and verified by Frank J. Murray, "Comptroller of the Treasury" and it designated David T. Wilentz, Attorney General, State House, Trenton, New Jersey, as "Attor-

ney Authorized to Represent Claimant". In the body of the claim, Paragraph (4) says:

> "(4) Security or lien, if any, for said claim: Statutory paramount lien on property for 1933 to 1937, inclusive, taxes; such lien on 1938 taxes attaches on November 1, 1938."

Also, in the body of the claim, Paragraph (10) says:

> "(10) Priority or preferential classification, if any, claimed for the claim, or any part thereof, the reasons therefor and full statement of the facts respecting same: Established by statute as a lien paramount to all other liens upon the lands, tangible property and franchises of Debtor from and after November 1, of the year for which the taxes for each year are assessed, respectively."

(Exhibit T-10, December 19, 1944);

(7) An answer to proof of claim No. D-17 of the State of New Jersey was filed by the Trustees of the property of Erie Railroad Company in the said reorganization proceedings of that company (Exhibit T-11, December 19, 1944);

[fol. 41] (8) A reply was filed in the said Erie reorganization proceedings to the answer and objections of the Trustees to the proof of claim filed therein by the State of New Jersey for unpaid taxes levied by the State of New Jersey upon the property and franchise of Erie Railroad Company, Debtor. That reply was signed "David T. Wilentz, Attorney General, Attorney for Claimant, State of New Jersey, State House, Trenton, New Jersey" (Exhibit T-12, December 19, 1944);

(9) A supplemental answer to proof of claim No. D-17 of State of New Jersey was filed by the Trustees of the property of the Erie Railroad Company in the said Erie reorganization proceedings (Exhibit T-13, December 19, 1944);

(10) A reply to the supplemental answer filed by the Trustees in the said Erie reorganization proceedings to proof of claim No D-17 of the State of New Jersey, and theretofore filed therein, was also filed in the said Erie re-

organization proceedings. That reply was signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, by Paul H. Keough, of Counsel, 1568 Union Commerce Building, Cleveland, Ohio. Attorneys for Claimant, State of New Jersey" (Exhibit T-14, December 19, 1944);

(11) A proof of claim for taxes for the years 1939 and 1940 against Erie Railroad Company, Debtor, was filed in the said reorganization proceedings of that company. That claim was signed:

"State of New Jersey
Name of Claimant
"By Homer C. Zink
"Comptroller of the Treasury."

[fol. 42] It was verified by Homer C. Zink, who swore that he was "the Comptroller of the Treasury of claimant herein." In the body of the claim Paragraph (4) says:

"(4) Security or lien, if any, for said claim: The state of New Jersey has a statutory paramount lien on the property of this debtor as to the 1939 tax. This lien took effect June 1, 1939, and as to the 1940 tax, this lien took effect on June 1, 1940."

Also, in the body of the claim Paragraph (8) says:

"(8) Priority or preferential classification, if any, claimed for the claim, or any part thereof, the reasons therefor and full statement of the facts respecting same: Claim for these taxes is by statute a lien paramount to all other liens upon the lands, tangible property and franchises of debtor, from and after June 1 of the years 1939 and 1940, respectively."

(Exhibit T-15, December 19, 1944);

(12) Answers to proof of claim supplemental D-17 of State of New Jersey were filed in the said Erie reorganization proceedings by H. A. Taylor, Vice-President and General Counsel and Robert E. Woodruff and John A. Haddon, Trustees of the Property of Erie Railroad Company, by H. A. Taylor, Counsel for Trustees, respectively (Exhibits T-16 and T-17, December 19, 1944);

(13) A reply was filed by the State of New Jersey as claimant in the said Erie reorganization proceedings to the answer of Erie Railroad Company to proof of claim supplemental No. D-17. This reply was signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, By Paul H. Keough, Attorneys for Claimant, State of New Jersey" (Exhibit T-18, December 19, 1944);

[fol. 43] (14) A further reply to the answer of the Trustees to proof of claim supplemental No. D-17 was filed in the said Erie reorganization proceedings by the State of New Jersey. It was signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, By Paul H. Keough, Attorneys for Claimant, State of New Jersey" (Exhibit T-19, December 19, 1944);

(15) A second supplemental answer to proof of claim No. D-17 of State of New Jersey was filed by the Trustees in the said Erie reorganization proceedings (Exhibit T-20, December 19, 1944);

(16) A reply was filed by the State of New Jersey in the said Erie reorganization proceedings to the second supplemental answer filed herein by the Trustees and signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, By Paul H. Keough, Attorneys for Claimant, State of New Jersey" (Exhibit T-21, December 19, 1944);

(17) An amendment was filed by the State of New Jersey as claimant in the said Erie reorganization proceedings to the reply theretofore filed therein to the Trustees' answer. This amended reply was signed "David T. Wilentz, Attorney General, Attorney for Claimant, State of New Jersey, State House, Trenton, New Jersey" (Exhibit T-22, December 19, 1944);

(18) In the reorganization proceedings in this Court of Northern Railroad Company of New Jersey, Debtor, which were also brought under Section 77, David T. Wilentz, as Attorney General of New Jersey, gave notice under date of October 18, 1939, to Northern Railroad Company of New Jersey and its Trustees that on November 2, 1939, he would apply to Thomas W. Trenchard, one of the Justices of the Supreme Court of the State of New Jersey, for an order

[fol. 44] that the unpaid part of the tax levied by the State Tax Commissioner against the Northern Railroad Company of New Jersey for the year 1933, pursuant to statutes referred to in that notice, be made a matter of record of that Court and judgment entered thereon. That notice is attached to and made a part of Exhibit W-2, December 19, 1944;

(19) Based upon the petition of the Trustees of Northern Railroad Company of New Jersey (Exhibit W-2, December 19, 1944) this Court made an order dated November 1, 1939, enjoining David T. Wilentz, Attorney General of the State of New Jersey, from taking any proceedings under or pursuant to the notice (last above referred to) theretofore served upon those Trustees by the said David T. Wilentz, Attorney General (Exhibit W-3, December 19, 1944);

(20) In the same proceedings the Attorney General of the State of New Jersey advised the Trustees of the Northern Railroad Company of New Jersey that he had no objection to the allowance of the injunction prayed for by them (Exhibit W-6, December 19, 1944) and the restraint against him was continued (Exhibit W-7, December 19, 1944);

(21) In the reorganization proceedings in this Court of the Susquehanna Railroad Company, a proof of claim was filed against the railroad for taxes due the State of New Jersey. In filing that proof of claim in those proceedings, the same course was pursued which was pursued in filing the claims in these proceedings and the claims there filed were in the same form and tenor as the proofs of claims filed in these proceedings. (See stipulation between counsel, Testimony, pp. 63 to 64.)

With reference to the general duties of the State Comptroller, *N. J. R. S. 54:19-10*, provides:

"The state comptroller shall:

"a. Superintend the collection of the revenue;

[fol. 45] "b. Take general charge and supervision of all rights, interest and property of the state;

"c. Institute and direct prosecution against delinquent officers of the revenue, and for just claims and debts due to the state;"

With reference to the general duties of the Attorney General of the State of New Jersey, *N. J. R. S. 52:17-2*, provides:

> "The attorney general shall, when not incompatible with his other public duties:
>
> • • •
>
> "g. Attend generally to all matters in which the state is a party or in which its rights and interests are involved;"

Based upon the course of conduct of the Comptroller and of the Attorney General in the other reorganization proceedings above mentioned, namely, the Erie Railroad Company, the Susquehanna Railroad Company and the Northern Railroad Company of New Jersey, and considering the statutes last above quoted with reference to the duties of those officers, it is the opinion of the Master that in connection with the filing of the claims of the State of New Jersey in these proceedings the Comptroller and the Attorney General acted in pursuance of their statutory duties and that the proofs of claims of the State of New Jersey filed in these proceedings were properly filed.

Section 77 of the Bankruptcy Act (c) provides:

> "(7) The Judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims [fol. 46] may be filed or evidenced and allowed, and for the purposes of the plan, and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests," etc.

Sub-section (c) of the same Act also provides:

> "(13) The judge may on his own motion • • • refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals," etc.

The same Act, in discussing a plan of reorganization in sub-section (b), provides, among other things, for "the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens," etc.

Sub-section (b), Paragraph (5) of the same Act provides:

> "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property," etc.

The same sub-section (b), Paragraph (5), also provides:

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

[fol. 47] Sub-section (a) of the same Act provides that the Court "shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property whenever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Sub-section (1) of the same Act provides:

> "(1) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

In the opinion of the Master, the foregoing provisions confer upon this Court jurisdiction over the kinds of claims asserted by the State in this proceeding and such construction of the Act is not unconstitutional as against the State,

but is within the power conferred upon the Congress by the Federal Constitution to establish uniform laws on the subject of bankruptcies *Van Huffel* v. *Harkelrode*, 284 U. S., p. 225; *New York* v. *Irving Trust Company, Trustee in Bankruptcy*, 288 U. S., p. 329.

The fact is, and the Attorney General of the State of New Jersey so asserts, that the State of New Jersey has claims for taxes against the Debtor, regardless of the effect of the filing of the formal proofs of claims in these proceedings because of the powers or lack of powers of any officer of the State in connection with the filing of these formal proofs of [fol. 48] claims. These claims, he asserts, are secured by liens upon the Debtor's property. In the opinion of the Master, that property is in the custody of the Court, by its Trustees, who have been duly appointed pursuant to Section 77 in these proceedings. That being so, by filing their petition, the Trustees are seeking an opportunity in this Court to defend the property of the Debtor, now in the custody of this Court, against alleged improper claims to that property. In the opinion of the Master, by so doing, the Trustees are not violating the sovereign immunity of the State of New Jersey from suit.

Section 64 (a) of the Bankruptcy Act, dealing with the priority of debts and the order of payment, provides:

> "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any sub-division thereof; Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court, and Provided Further, That in case any question arises as to the amount or legality of any taxes; such question shall be heard and determined by the court."

Doubt has been cast upon the applicability of the above section to proceedings under Section 77 by the case of *Arkansas Corporation Commission* v. *Thompson*, 313 U. S., p. 132, but subsequent decisions of District Courts and Circuit Court of Appeals have construed that case as deny-

ing jurisdiction to re-determine the amount of tax claims in limited situations, for example, where the valuation of property has been previously determined by a quasi-judicial taxing body. *Lyford* v. *State of New York*, 140 F. (2d) p. [fol. 49] 840, 2d Circ.; *in re: Monongahela Rye Liquors*, 141 F. (2d) p. 864, 3d Circ.

Both in his brief and on the oral argument, the Attorney General conceded that the Bankruptcy Court has the power as against the State to determine the validity of tax claims of the State, where such claims are unsecured. (Brief, p. 20, citing *New Jersey* v. *Anderson*, 203 U. S., p. 483). The Attorney General makes a distinction between the effect of the State's assertion of unsecured claims and the effect of the State's assertion of secured claims. He argues that when asserting an unsecured claim, the State is applying to be paid out of assets *in custodia legis*, but when the claims of the State are secured by liens, the lien interests of the State are not *in custodia legis* and so any proceedings in this Court affecting those liens, such as the Trustees' petition, is a suit against which the State has sovereign immunity.

In the opinion of the Master, the entire property of the railroad is *in custodia legis*, subject, however, to such rights as are given by law to lienholders. The cases cited by the Attorney General do not hold otherwise. Having custody of the property, the Bankruptcy Court, subject to the limitation expressed in the case of *Arkansas Corporation Commission* v. *Thompson*, 313 U. S., p. 132, *supra*, which limitation is not now involved, is the proper Court to determine the validity and amount of the tax claims of the State of New Jersey and the incidental liens alleged to affect the property in the custody of the Court. *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S., p. 734, at p. 738.

It is the opinion of the Master that the claim of the State to sovereign immunity should be denied and that the petition of the Trustees should not be dismissed.

Respectfully submitted, Augustus C. Studer, Jr.,
Special Master.

Dated: January 17th, 1945.

[fol. 50] EXHIBIT "B" TO ANSWER

OPINION

Confirming Special Master's Report

APPEARANCES:

Shelton Pitney, Esq., Walter P. Gardner, Esq., Trustees; Benjamin C. Van Tine, Esq., For the State of New Jersey; Edwin M. Slote, Esq., Attorney for Watters Committee; Blair Reilly, Esq., Attorney for Inst. Group of Bondholders.

FAKE, District Judge:

The issue here arises in a railroad reorganization proceeding under Section 77 of the Bankruptcy Act.

The State of New Jersey through its Comptroller filed certain proofs of claim with the trustees herein for unpaid taxes due the State.

An order of Reference was made by me directing the Special Master, appointed under Section 77(c)(13) of the Act, to hear and report on the amount and validity of said tax claims.

The Attorney General of the State contended before the Master, and as well here, that this court is without jurisdiction to hear and adjudicate the tax claims as in said Order of Reference provided.

The Master has forwarded to this court the record made before him on the subject of jurisdiction, together with the briefs filed before him, and has filed his report thereon holding that this court does have jurisdiction and that the [fol. 51] theory of the sovereign immunity of the State does not apply.

The issue is now before me on motion to adopt and confirm the Master's report.

Upon a consideration of the said Master's report and the record returned therewith, together with the substance of the briefs and oral arguments made before me, I am of the opinion that this court has jurisdiction as asserted and that the Master's report should be adopted and confirmed in all things.

An order will be entered herein overruling the objections and confirming the Master's report.

I will hear counsel on the form of the order.

Filed: February 21, 1945.

EXHIBIT "C" TO ANSWER

Order No. 271 Overruling Objections of State of New Jersey to Interim Report of Special Master Dated January 17, 1945 and Confirming Said Report

This Court by order No. 66 in this cause dated October 7, 1940 having required the claims of all creditors "including all claims of whatever character" against the Debtor "or its property" to be filed by December 31, 1940 in the form and manner prescribed by said order, and the State of New Jersey having thereupon, within time and in the form prescribed by said order, filed its proofs of claim (Nos. 34-38) for balances of taxes alleged to be due to it from the Debtor and for interest or interest penalties on said balances at the rate of 1% per month; and the Trustees having on March 3, 1941 filed objections to said claims, to which the State of New Jersey on March 26, 1941 [fol. 52] filed its "reply of claimant, State of New Jersey, to Trustees' objections to tax claims"; and this Court by Order No. 93 dated April 1, 1941 having referred all disputed claims (including the State's claims aforesaid) to the standing Special Master, "together with all objections thereto, for hearing and report thereon"; and the Legislature of the State of New Jersey having thereupon enacted Chapter 290 of the Laws of New Jersey of 1941, effective July 22, 1941, (subsequently amended by Chapter 241 of the Laws of 1942), known as the Railroad Tax Settlement Act and this Court by Order No. 123 dated August 8, 1941 having authorized and directed the Trustees of the Debtor to comply with said Act and having thereafter by Order No. 135 dated November 24, 1941 adjudicated that the Trustees had taken all steps necessary to comply and should continue to comply with said Act and having by Order No. 163 dated June 12, 1942 revoked so much of said Order No. 93 as referred the State's proofs of claim (Nos. 34-38), as aforesaid, to the standing Special Master for hearing and report thereon; and the United States Circuit Court of Appeals for the Third Circuit having reversed said Order No. 163 in certain other respects, on the appeal of the State of New Jersey, and having remanded the record on said appeal to this Court to await the determination by the Court of Chancery of New Jersey of the constitutionality of said Railroad Tax Settlement Act unless this Court

should find that delay which might be harmful to the Debtor and its creditors might result, in which event this Court might proceed itself to hear and decide the constitutional issue; and following the decisions of the courts of the State of New Jersey in the suit so referred to by the United States Circuit Court of Appeals, this Court having by Order No. 250 dated October 16, 1944 referred and re-referred to the standing Special Master for hearing and [fol. 53] report thereon said tax claims filed by the State of New Jersey, all objections thereto and the State's reply to said objections, and also the State's plea of sovereign immunity from suit filed herein on August 28, 1944, in the form of a special appearance; and supplemental, amended and additional objections and defenses to the State's proofs of claim having thereupon been filed by the Trustees, by the Institutional Group of Bondholders and the Trustees of the Debtor's General Mortgage, and by the Bondholders' Committee known as the Watters Committee, and the State of New Jersey having thereupon filed its further replies to such supplemental, amended and additional objections and defenses; and the Master on December 19, 1944 having taken testimony and heard argument under said Order No. 250 touching the State's plea of sovereign immunity aforesaid and having on January 17, 1945 filed an interim report wherein he concluded, among other things, that the Court has jurisdiction in the premises and that the plea of sovereign immunity should be denied; and the State of New Jersey having thereupon filed objections to said interim report, and said interim report and the State's objections having thereupon been duly brought on for hearing and argument before this Court on February 7, 1945, on notice to all interested parties; and the Court having heard the arguments of Benjamin C. Van Tine, Esq., Deputy Attorney General, on behalf of the State of New Jersey, in opposition to confirmation of said interim report and in support of the State's said objections thereto, and of Shelton Pitney, Esq., one of the Trustees of the Debtor, Blair Reiley, Esq. and Willard P. Scott, Esq., of counsel with the Institutional Bondholders' Group, and Edwin M. Slote, Esq., of Counsel with the Watters Committee, in support of said interim report, and having considered the record herein; and the Court being of opinion that it has jurisdiction to [fol. 54] consider and pass upon the proofs of claim filed

by the State, all objections thereto filed with the Special Master and the State's replies to said objections; and that the State's plea of sovereign immunity is inapplicable and therefore without merit:

It is, on 5 day of March, 1945, Ordered that the objections filed by the State of New Jersey to the interim report of the Special Master dated January 17, 1945 be and the same are hereby overruled, that the Special Master's findings and conclusions as set forth in said report be and they are hereby adopted by this Court and that said report be and the same is hereby confirmed.

Guy L. Fake, United States District Judge.

Filed: March 5, 1945.

IN UNITED STATES DISTRICT COURT

PETITION FOR AN ORDER OF APPROVAL UNDER SECTION 205 TITLE 11, UNITED STATES CODE, AND FOR FURTHER RELIEF

To the Honorable the Judges of t[illegible] District Court of the United States for the District of New Jersey:

* * * * * * *

First: The Debtor is a railroad corporation organized and existing under the laws of the State of New Jersey.

[fol. 55] IN UNITED STATES DISTRICT COURT

PETITION FOR ADJUDICATION CONCERNING NEW JERSEY STATE TAX CLAIMS AND FOR ORDER No. 250

To the Honorable Guy L. Fake, one of the Judges of the United States District Court for the District of New Jersey:

The petition of Shelton Pitney and Walter P. Gardner, Trustees of the properties of the Debtor herein, respectfully shows:

1. Petitioners qualified herein as Trustees of the properties of the Debtor on January 8, 1940. At that time the State of New Jersey claimed that the Debtor owed more

than $13,000,000 for unpaid balances on account of the principal amount of taxes assessed under the Railroad Tax Act for the years 1932 to 1939, both inclusive, as follows:

Year	*State's Claim Allegedly Unpaid Balances, Principal of Taxes*
1932	$2,070,607.32
1933	1,908,577.62
1934	1,556,408.78
1935	1,529,125.79
1936	1,642,352.27
1937	1,435,165.14
1938	1,508,844.94
1939	1,366,368.82

The Debtor had paid the State in and for said years a total of more than $17,000,000 which it asserted was the maximum amount of taxes lawfully assessable.

2. The State of New Jersey also claimed that the Debtor owed the following unpaid balances on account of the principal amount of taxes assessed under the Railroad Tax Act [fol. 56] in respect of the properties of The Dover and Rockaway Railroad Company for the years 1933 to 1939, both inclusive:

Year	*State's Claim Allegedly Unpaid Principal of Taxes*
1933	$ 3,615.38
1934	2,589.94
1935	2,637.88
1936	2,380.73
1937	2,224.54
1938	2,025.96
1939	4,443.06
Total	$19,917.49

3. The State of New Jersey also claimed that the Debtor owed the following unpaid balances on account of the principal amount of taxes assessed under the Railroad Tax Act

in respect of the properties of The Ogden Mine Railroad Company for the years 1933 to 1939, both inclusive:

Year	*State's Claim Allegedly Unpaid Principal of Taxes*
1933	$2,909.23
1934	2,279.44
1935	559.60
1936	631.96
1937	583.22
1938	623.26
1939	1,358.02
Total	$8,944.73

[fol. 57] 4. All of said tax claims were then in litigation in other tribunals except the claims for the years 1932 and 1933. Earlier litigation concerning the claims for those years had resulted unfavorably to the Debtor. Threats by the State of New Jersey to enter a judgment or judgments against the Debtor upon said claims and to sell the railroad properties of the Debtor located within the State of New Jersey forced the Debtor to file its petition in bankruptcy herein on October 30, 1939.

5. Shortly thereafter the District Court of the United States for the District of New Jersey, sitting as a court of equity, made and entered a decree enjoining the State of New Jersey from collecting or attempting to collect more than 70% of such taxes purportedly assessed by the State of New Jersey for the years 1934, 1935 and 1936.

Like decrees were simultaneously entered in favor of various other railroads. The State of New Jersey appealed or purported to appeal from said decrees to the Circuit Court of Appeals for the Third Circuit, but in respect of the decree so entered in favor of the Debtor failed and neglected to join your petitioners as parties respondent; and your petitioners did not appear in or become parties to the purported proceedings before the Circuit Court of Appeals and did not join in either of the applications made by other railroads for a rehearing by said Court and a writ of certiorari from the Supreme Court of the United States, both of which applications were denied.

6. From the time of their qualification on January 8, 1940 as aforesaid to August 8, 1941 your petitioners, as officers of this Court actively and in good faith litigated the aforementioned tax claims of the State of New Jersey for the years 1937, 1938 and 1939 but, by authority of this Court, paid an additional $900,000 on account of the State's [fol. 58] tax claims for the years 1932 and 1933 by installment payments of $150,000 each on July 1, August 1, September 1, October 1, November 1 and November 30, 1940, thereby reducing the total claims of the State of New Jersey for the principal amount of unpaid taxes for the years 1932-1939, inclusive, to $12,117,450.68.

In addition, your petitioners, on February 8, 1940, paid on account of taxes claimed in respect of the properties of The Dover & Rockaway Railroad Company, the sum of $6,281.22, thereby reducing the principal taxes claimed in that respect to $13,636.27, and on account of taxes claimed in respect of the properties of The Ogden Mine Railroad Company the sum of $3,724.04, thereby reducing the principal taxes claimed in that respect to $5,220.69.

7. Also by authority of this Court petitioners contested the 1940 tax assessed by the State upon their railroad properties in New Jersey in the sum of $3,303,213.18 and paid the State $1,981,927.91 (or 60%) which they believed was the maximum amount lawfully assessable for said year, leaving a balance claimed by the State for said year of $1,321,285.27. For the same reason and by like authority they caused to be paid 60% of the taxes assessed for 1940 in respect of the properties of their affiliated companies, and contested said assessments.

For the same reason and by like authority petitioners contested the taxes assessed by the State for the year 1941, until the Legislature of the State of New Jersey enacted the Railroad Tax Settlement Act hereinafter referred to and until petitioners accepted and in good faith complied with all of the conditions thereof and assumed all of the burdens imposed thereby.

8. On December 10, 1940 the State of New Jersey, by Frank J. Murray, Comptroller of the Treasury of New [fol. 59] Jersey, filed a proof of claim in these proceedings for the unpaid balances of taxes allegedly owing from the estate of the Debtor for the years 1932 to 1939, inclusive, in

the total amount of $12,117,450.68 with interest thereon in the sum of $7,732,339.53 to December 1, 1940, and interest from December 1, 1940 to the date of payment. A true copy of said proof of claim, No. 38, is hereto annexed as Schedule "A".

9. At the same time the State of New Jersey also filed in these proceedings the following proofs of claim for the following unpaid balances of taxes assessed in respect of the properties of the following companies, respectively:

No.	Name of Company	Amount of Principal Claimed	Amount of Interest Claimed to December 1, 1940
34	The Ogden Mine Railroad Company	$ 5,229.69	$ 5,149.19
35	The New York and Long Branch Railroad Company	318,305.30	140,495.05
36	The Dover and Rockaway Railroad Company	13,636.27	9,302.82
37	The Bay Shore Connecting Railroad Company	5,528.40	3,601.50

together with interest from December 1, 1940 to date of payments.

10. Petitioners filed objections to said proofs of claim Nos. 34, 35, 36, 37 and 38. A true copy of their objections to claim No. 38 is hereto annexed as Schedule "B". Petitioners were advised, *inter alia*, that the tax claims for years 1932 to 1939, inclusive, and as well the taxes assessed for the year 1940, were predicated upon the application of an "average tax rate" for each of said years [fol. 60] which had been computed in violation of the Constitution and statutes of the State of New Jersey and that said tax rate was grossly inflated because of the intentional, systematic and fraudulent under-assessment of real estate in the State of New Jersey taxable under the General Tax Act and the intentional systematic and fraudulent under-assessment and non-assessment of personal property taxable under said General Tax Act, and particularly the intentional, systematic and fraudulent omission to include intangible personal property in the ratables taxed under said Act (except as to some of the years the in-

tangible personal property of a few corporations or estates in a very few of the hundreds of taxing districts of the State). Said intentional, systematic and fraudulent exclusion of intangible personal property and under-assessment of other property generally resulted in the use of a false, unlawful and grossly deflated denominator in striking the tax rate applicable to the Debtor and to petitioners, as Trustees of the Debtor's properties. Petitioners were advised and were prepared to establish in support of their objections that they were without remedy in the courts of the State of New Jersey for the aforesaid intentional, systematic, fraudulent and discriminatory method of assessing property, except by proceedings to correct each under-assessment and failure to assess, that a taxpayer cannot be limited to that remedy,—which is no remedy at all,—and that for a state to so limit a taxpayer's remedy is to deny him his constitutional rights; that the grossly inflated tax rate resulting from the intentional, systematic and fraudulent non-assessment and under-assessment of property under the General Tax Act, for which, as aforesaid, the Debtor had been and your petitioners were without remedy in the state courts, had deprived and by virtue of the action of the State of New Jersey in seeking to enforce and collect taxes based on such grossly inflated tax [fol. 61] rate was threatening to deprive the Debtor's estate and your petitioners as Trustees thereof of its and their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; that such deprivation and denial of due process could be promptly remedied only in this Court; and that under such circumstances this Court was not only vested with jurisdiction to hear and adjudicate the tax claims of the State of New Jersey for the years 1932 to 1940, inclusive, but was obliged in the performance of its bankruptcy powers and duties so to do and to determine the amounts of the State's claims, if any, when lawfully computed in conformity with the Constitution and statutes of the State of New Jersey.

11. On April 1, 1941 this Honorable Court made and entered herein its Order No. 93 referring said proofs of claim of the State of New Jersey for the years 1932 to 1939 (with other disputed claims) to the Honorable Augustus C. Studer, Jr., as Special Master, together with all objections thereto, for hearing and report thereon.

12. Meanwhile, the Governor of the State of New Jersey had appointed a committee to investigate the railroad tax problem which had resulted to a major extent from such annual application of a grossly inflated tax rate, as aforesaid, and said committee on February 22, 1941 made a comprehensive report which was subsequently considered by a committee of the Legislature of the State of New Jersey and by the Legislature itself, with the result that the Legislature enacted Chapters 290 and 291 of the Laws of 1941, approved and effective July 22, 1941.

13. By the provisions of Chapter 290 of the Laws of 1941 the State Treasurer was authorized and required to accept, without interest penalties, installment payments of [fol. 62] the full balance of the principal amout of the taxes assessed for the years 1932 to 1940, inclusive, which remained unpaid on July 22, 1941, provided that a railroad taxpayer complied with the requirements of Sections 7 and 8 of said Act, which provided as follows:

"7. Undertaking; first payment. Any railroad or system, or the receiver, trustee or trustees thereof, may enter upon the execution of an installment payment plan authorized under this act by (1) duly executing and filing with the State Comptroller a written undertaking, in such form as the Attorney-General shall prescribe, for the payment of the total amount of delinquent taxes owed by the railroad or system and (2) paying into the State treasury an amount not less than the first annual installment together with interest on the unpaid balance computed in the manner provided by sections two, three and four of this act.

"8. Waivers. The first payment tendered pursuant to this act shall be accompanied by a waiver of any and all rights to contest the legality or amount of any assessment made prior to December first, one thousand nine hundred and forty-one, together with stipulations, consents or other papers for the discontinuance and dismissal of all suits, actions, and proceedings pending in any court or before the Board of Tax Appeals concerning such assessments, all in such form as the Attorney-General may require."

14. Thereupon on August 8, 1941 this Court, after considering said offer of compromise, made and entered herein its Order No. 123, authorizing petitioners to accept the compromise of said tax claims offered in and by said Chapter 290 by agreeing to pay the full unpaid balance [fol. 63] of the principal amounts of taxes claimed by the State of New Jersey for the years 1932 to 1940, inclusive, viz., the principal amout of $13,438,669.19, said payments to be made in installments over a period of twenty years, as authorized and provided for in said act, without penalties but with interest at the rate of 3% per annum computed from December 1, 1940, as required by the terms of said offer. At the same time and by the same order your petitioners were authorized to tender and pay the full unpaid balance of the principal amount of taxes claimed in respect of the properties of The Dover and Rockaway Railroad Company amounting to $15,185.44, and the full unpaid balance of the principal amount of taxes claimed in respect of the properties of The Ogden Mine Railroad Company amounting to $5,776.23.

15. Petitioners thereupon caused to be filed with and delivered to the appropriate officers of the State all of the documents and payments required for full compliance by them and by The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company with the conditions of said offer and the provisions of said Order No. 123; and also caused to be filed with and delivered to the appropriate officers of the State all of the documents and payments required for full compliance by the The New York and Long Branch Railroad Company and by The Bay Shore Connecting Railroad Company.

16. Thereafter and on September 4, 1941, one David T. Wilentz, then Attorney General of the State of New Jersey, instituted a proceeding in the Court of Chancery of New Jersey known as a civil information suit, wherein "David T. Wilentz, Attorney General of the State of New Jersey" was named as "Informant" and the State Treasurer was named as "Defendant". No other party was [fol. 64] named or appeared in said suit. Therein said Informant prayed an injunction against the State Treasurer from carrying out the provisions of said Chapter 290 and alleged that said chapter was in violation of Article I, Paragraph 20, of the Constitution of the State of New

Jersey, which provides that "no donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

17. Pursuant to Order No. 107 of this Court dated June 9, 1941 and before the enactment of Chapter 290 of the Laws of that year petitioners had appealed to the New Jersey State Board of Tax Appeals from the assessment of railroad taxes made by the State for the year 1941. In view of their acceptance of and compliance with the provisions of Chapter 290 including their waiver as thereby required of any and all rights to contest the legality or amount of any assessment made prior to December 1, 1941, petitioners felt compelled to pay the 1941 taxes in full and they therefore applied to this Honorable Court for aid, instructions and authority in the premises in view of the steps taken by them so to comply as in their petition set forth. Petitioners recited, *inter alia*, the institution of the civil information suit referred to in Paragraph 16 hereof, the enactment of Chapter 291 of the Laws of 1941 and the adoption by the Legislature of the State of New Jersey in November 14, 1941 of a concurrent resolution directing the Joint Legislative Committee on Railroad Taxation to study the operation of the 1941 railroad tax laws and to report thereon to the then session of the Legislature with any recommendations tending to improve the administration of said laws or to make more certain the attainment of the objectives sought by the Legislature in the passage of said laws (including the objective to so revise the rail-
[fol. 65] road tax law that taxes on the railroads would be reduced). Petitioners' said application was heard by this Honorable Court on November 24, 1941 and on said date this Court made and entered its Order No. 135 wherein and whereby it found, adjudicated and decreed, *inter alia*, that petitioners had taken all steps necessary to comply with the provisions of said Chapter 290, that no objection had been made by the Comptroller, the Treasurer or the Attorney General of the State of New Jersey as to the form or validity of any of the undertakings, waivers, stipulations, etc., which petitioners had filed pursuant to said chapter and that in view of such compliance with the requirements of said chapter and their waiver of any and all rights which they had to contest the legality

or amount of any assessment made prior to December 1, 1941, petitioners should pay the full amount of the taxes assessed for the year 1941. Petitioners promptly complied with said order and paid said full amount.

18. Thereafter, the Legislature enacted Chapter 169 of the Laws of 1942, approved and effective May 8, 1942, amending certain of the provisions of Chapter 291 of the Laws of 1941. Said statute (Chapter 169) so amended the franchise tax provisions of said Chapter 291 as to levy a retroactive franchise tax against petitioners for the preceding tax year, 1941, in the amount of $239,749.80 and so increase their tax burden for that year by said sum, while at the same time said statute (Chapter 169) provided for a reduction in the franchise taxes assessed for said year 1941 against most of the other railroads operating in the State of New Jersey and for the complete elimination of said franchise taxes as to certain other railroads operating in the State of New Jersey and thus decreased their respective tax burdens retroactively for said year. Petitioners show that said Chapter 169 arbitrarily and unjustly discriminated as between members of a single class [fol. 66] of taxpayers, all of such railroad taxpayers being subject to taxation under the Railroad Tax Act of the State, as amended; singled petitioners out as victims of arbitrary recomputation of the 1941 railroad franchise taxes, while at the same time financially benefiting other railroad taxpayers; and denied to petitioners and to Debtor the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States; and that in purporting to assess a retroactive franchise tax against petitioners for the year 1941 deprived them and the Debtor of their and its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; and petitioners were preparing at the time of the enactment of the statute next referred to to challenge the constitutionality of said Chapter 169 and the assessment or levy of any franchise tax thereunder against petitioners for the year 1941.

19. Thereupon the Legislature of the State of New Jersey enacted Chapter 241 of the Laws of 1942, approved and effective May 21, 1942, amending in various respects said Chapter 290 of the Laws of 1941.

20. Said Chapter 241 added various burdens and conditions to those imposed upon petitioners and upon the Debtor's estate by the act which it amended (said Chapter 290, Laws of 1941). Among other things, it provided that "any railroad taxpayer desiring to accept the provisions of this act shall, on or before June fifteenth, one thousand nine hundred and forty-two, file with the State Treasurer the acceptance documents required by this act, * * * waiving any and all rights to contest the legality or amount of any assessment on its property used for railroad purposes made prior to December first, one thousand nine hundred and forty-one, pursuant to the ap-
[fol. 67] plicable tax acts, *and of any assessment heretofore or hereafter made for the tax year one thousand nine hundred and forty-one* * * *." Accordingly, your petitioners were required unequivocally to abandon their contemplated challenge of the retroactive franchise tax for the year 1941 in the amount of $239,749.80, hereinabove referred to, and to incorporate in their "acceptance document" their written waiver of "any and all rights to contest the legality or amount" of said retroactive franchise tax assessment, and also any other tax that might thereafter be assessed for said year, or risk the contention that they had abandoned their acceptance of the State's offer or had failed in all respect to comply therewith in good faith. Petitioners were also required by said Chapter 241 to make an additional interest payment on or before June 15, 1942 in an amount exceeding $340,000, such additional interest resulting from the requirement of accelerated payment of interest and the requirement that interest be computed from December 1, 1940 upon the entire principal amount of taxes claimed by the State as of that date, without deducting therefrom the first installment of principal previously paid as alleged in paragraph 15 hereof. Petitioners were advised that there was grave doubt as to the validity of the legislative action in adding these and other burdens and conditions after petitioners' acceptance in 1941 of the offer then made by the State (Chapter 290, Laws of 1941), but in view of the specific requirements and time limit provided for in said Chapter 241 this Court on June 12, 1942 made and entered its Order No. 163 in this proceeding directing petitioners on or before June 15, 1942 to comply and agree to comply in the future in all respects with said Chapter 241, while at

the same time recognizing and reciting that there was ground for serious doubt as to whether the principal amount of taxes claimed by the State was legally due.

[fol. 68] 21. Petitioners thereupon fully complied in all respects with said Chapter 241 not only as to the taxes assessed by the State of New Jersey against the Debtor or petitioners for the years 1932 to 1940, inclusive, but also as to all taxes claimed from petitioners on account of taxes assessed in respect of the properties of The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company,—and waived any and all right to contest the legality or amount of said retroactive franchise tax for 1941, which said tax petitioners paid in good faith and without contest and for the recovery whereof the laws of the State provide no right or remedy. They also paid, as required, said additional interest. Petitioners also caused to be filed and delivered to the appropriate officers of the State all of the documents and payments required for full compliance with the terms of said Chapter 241 by The New York and Long Branch Railroad Company and The Bay Shore Connecting Railroad Company.

22. After petitioners had so complied and had caused the four affiliated companies above named to comply with said Chapter 241 of the Laws of 1942 and had in good faith waived all such rights of contest and had paid without contest the aforesaid retroactive franchise tax of $239,749.80 and the additional and accelerated interest aforesaid, the Court of Chancery of the State of New Jersey on September 28, 1943 made and entered a final decree in said civil information suit a copy of which final decree is hereto annexed as Schedule "C". The opinion of the Vice-Chancellor who advised said decree is reported, 133 N. J. Eq. 447. Thereupon said State Treasurer appealed from said decree to the Court of Errors and Appeals of New Jersey, which affirmed said final decree by a vote of ten to four. The majority and dissenting opinions are reported, 135 N. J. Eq. 244, 261.

[fol. 69] 23. As will more fully and at large appear by reference to the opinions hereinabove cited, the decisions of the New Jersey courts that Chapter 290 of the Laws of 1941, as amended by Chapter 241 of the Laws of 1942, contravenes Article I, Paragraph 20, of the Constitution of

the State of New Jersey, were rested upon a finding of fact. That finding was that there was no "substantial and valuable consideration" and no "moral or equitable consideration" received by the State for the "remission, cancellation and abatement" of what was concluded to be a part of the "tax debt" in which the State of New Jersey had a "vested interest," to wit, for the remission, cancellation and abatement of interest at 1% per month on what (without the presence as parties of petitioners or any other party similarly situated) the New Jersey courts found or assumed to be due the State on account of unpaid balances of taxes. Thus, the question of local or State law decided by the State courts was that a remission of interest on railroad taxes unsupported by consideration is violative of said paragraph 20. To the extent that the State courts purported to find as a fact that there was no substantial and valuable consideration and no moral or equitable consideration to the State for the remission of interest claimed from petitioners and the Debtor's Estate, and so purported to try *ex parte* all of petitioners' pending railroad tax cases and their objections in this Court to the State's proofs of claim herein,—with only officers of the adverse tax claimant as parties,—no question of local or State law or policy was involved. The purely factual conclusion, if such it was intended to be, was in nowise controlling upon petitioners or this Honorable Court. If, however, the State courts merely assumed said conclusion of fact, then there is no decision either of local or any other character which the State may urge upon this Honorable Court.

[fol. 70] 24. Petitioners show that neither Chapter 290 of the Laws of 1941 nor Chapter 241 of the Laws of 1942 required acceptance by all of the railroads affected but permitted and authorized acceptance of the legislative offer by "any" one or more of them and that both statutes expressly recognized the different degrees of their burdens that would be involved in their acceptance of the offer made and in complying with the provisions of the law and prescribed a "burden index" and formula for deferred installment payments over a period of not less than two nor more than twenty years measured by "the respective capacity to pay of each". Said "burden index" was to be determined as to any acceptor by dividing the total amount of its unpaid tax claims as of December 31, 1940 "by the

five-year average of its net railway operating income" for the years 1936 to 1940, inclusive, and by affording it the number of whole years "next greater than seven times its 'burden index'" for its installment payments.

Petitioners became entitled under said formula to make installment payments over the maximum period of twenty years.

25. Petitioners further show that Section 12 of Chapter 290 of the Laws of 1941 provides as follows:

> "12. Effect of unconstitutionality. If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of this act, or application of such provision to other persons or circumstances, shall not be affected thereby.",

and that Section 15 of Chapter 241 of the Laws of 1942 also provides:

> "15. If any provision of this act or the application thereof to any person or circumstances is held invalid, [fol. 71] the remainder of this act, or the application thereof to other persons or circumstances, shall not be affected thereby."

26. Petitioners are prepared to prove that there were many valuable considerations, and, as well, moral and equitable consideration, for the presupposed remission, cancellation and abatement of the interest claimed by the State of New Jersey from your petitioners on the unpaid balances of taxes claimed by the State of New Jersey from your petitioners. Among said considerations, upon which the Legislature of the State of New Jersey was justified in relying and must be presumed to have relied are the following:

> (1) In and by said laws the State, by its Legislature, exacted as a condition of the proposed compromise that petitioners make an unqualified and unconditional promise to pay the full amount of the taxes claimed by the State even though they were still in controversy and were not being collected. The Legislature of New Jersey knew that the State's claims for taxes and interest were being litigated by petitioners as officers of this court, with the knowl-

edge and approval and under the direction of this Court, and therefore knew that all of the State's claims were being contested in good faith and because this Court believed in the performance of its duties that there were fairly debatable questions of law and fact that had to be determined in the interest of the Debtor's estate and a fair and equitable reorganization thereof. The Legislature would not have been justified in assuming and may not be presumed to have assumed that the litigation so being waged by your petitioners would be resolved against your petitioners either because earlier litigation in which the [fol. 72] unlawful tax rate had not been urged had resulted unfavorably to the Debtor or otherwise. The Legislature must be presumed to have known the law of the State of New Jersey to be, as pronounced by its courts, that tax assessments are made each year and that each annual assessment of property for taxation is a separate entity, distinct from the assessment of the previous or subsequent years; also that property to be assessed is to be taken and valued in the actual condition in which the owner holds it. All that the State proposed to give up in return for such unqualified and unconditional promise, notwithstanding the debatable character of the claim, was a claim for interest, if any, on said disputed and unliquidated claim for taxes;

(2) At the time of the enactment of said Chapter 290, approved and effective July 22, 1941 the cash position of the Debtor, its need for liquid working capital and its requirements for administration and reorganization expenses were such that it was evident any plan that might be devised and promulgated for the reorganization of the Debtor pursuant to Section 77 of the Bankruptcy Act (11 U. S. C. A., Section 205) would necessarily fall far short of providing for a cash payment to the State of New Jersey equal to even the State's claim for unpaid balances of taxes, if allowed, quite apart from any interest claim;

(3) It was uncertain what character or amount of securities would or could be authorized by the Inter-

state Commerce Commission and court for issuance in satisfaction of the State's tax claims to the extent, if any, that they might ultimately be allowed, and whether any such securities would be fixed interest [fol. 73] bonds or income bonds or stock, or a combination of any two or more thereof, and what interest or dividend rates upon any such securities might be authorized, and, to the extent of any authorized income bonds or preferred stock whether the same would be non-cumulative or wholly or partly cumulative, and what the maturity date of any such bonds might be; and what the market value of any such securities might prove to be;

(4) The State's lien for any allowed tax claim or claims could be of no avail during the pendency of the bankruptcy proceedings herein because no such lien could be enforced by a sale of any of the Debtor's railroad properties while the same were *in custodia legis* under Section 77 of the Bankruptcy Act and because this Court, in conformity with the very purpose of Section 77, had enjoined the State of New Jersey from any proceedings to enforce its tax claims;

(5) Any lien of the State, even if enforceable, would have been of doubtful value because necessarily limited in scope to the properties of the Debtor located within the State of New Jersey, which said properties had been and were operated at a loss and the operation whereof at a profit, if separately acquired and operated, would have been difficult or impossible;

(6) Any lien of the State, even if enforceable, would have been of doubtful value because upon the foreclosure of such lien and the acquisition by the State of New Jersey of the properties of the Debtor within the State, the State would lose such properties as a source of tax revenues as long as it continued to own the properties and would also risk operating deficits from State operation and ownership;

[fol. 74] (7) There was doubt under applicable authorities whether the State had a lien for interest accruing on the taxes covered by the proofs of claim filed by the State.

(8) Successful or partially successful prosecution by the State of its aforesaid proofs of claim filed in these proceedings would have required an adjudication also by this Court of difficult questions involving the priority of claims by the Debtor's bondholders upon the quick assets in the hands of petitioners in view of the source of these assets and the necessity for using earnings from the Debtor's mileage outside New Jersey upon which the bondholders had a lien and the State had none, for the maintenance, betterment, improvement and operation of the properties of the Debtor within the State of New Jersey to which any lien of the State was limited by statute and constitutional law;

(9) Litigation as to the grossly inflated tax rate to which reference has hereinabove been made would have revealed that the long succession of equalization statutes enacted by the Legislature of the State for the very purpose of correcting the discriminatory abuses which resulted in such grossly inflated tax rate had been so neglected and disregarded that the State was under a moral obligation and legal duty to the Debtor and to petitioners to make fair and equitable amends for said neglect;

(10) There was doubt under applicable authorities whether the State could in any event claim interest at any rate during the period of the Debtor's bankruptcy upon taxes which had become payable prior to the date of such bankruptcy, the Debtor's railroad [fol. 75] property being *in custodia legis*, and further, at what rate such interest, if any, would be allowed;

(11) It was uncertain whether any plan of reorganization promulgated by the Interstate Commerce Commission and approved by this Court would authorize the issuance, as of some earlier date, of the new securities to be authorized, from which unfixed date no further interest or penalties would have accrued on the State's claim;

(12) The Debtor's railroad properties in New Jersey had been and at the time of the enactment of said Chapter 290 were largely terminal properties whose

review of this petition that the State is not so bound and that petitioners are likewise not bound, then petitioners are [fol. 78] advised that equity would require this Honorable Court to take all such steps as might be appropriate to restore the equivalent of the *status quo ante* and so avoid gross prejudice and inequity to all other creditors and persons interested in the Debtor's Estate. In such event this Court would be required fully to consider and adjudicate the rights of the State of New Jersey under its proofs of claim herein and petitioners' objections thereto and also the relative rights and priorities of the State and other lienholders in the assets of the Estate and, in particular, the quick assets thereof.

31. Reorganization of the Debtor has long been delayed because of the pendency of the civil information suit, disposition whereof has at last turned upon questions which can neither bind petitioners nor govern the provisions of a reorganization plan.

32. Before a plan can be formulated or promulgated it will be necessary for this Honorable Court to consider and adjudicate the matters herein mentioned or some of them. Petitioners show that prompt consideration and adjudication thereof is essential and that further delay could only serve to prejudice all parties in interest and, as well, the public interest.

33. Petitioners further show that on or before December 1, 1944 they will be required by their agreement filed under said Chapter 290 of the laws of 1941 as amended by said Chapter 241 of the Laws of 1942 to make an additional installment payment to the State of New Jersey on account of the principal amount of the taxes claimed by the State together with an additional interest payment; and that petitioners will require the aid, instructions and protection [fol. 79] of this Court in the premises prior to December 1, 1944 and particularly an adjudication by this Court whether they entered into a contract with the State of New Jersey and should continue to perform the same by making such additional payment on account of principal and such additional interest payment.

Wherefore petitioners pray that this Honorable Court, the premises considered, may promptly adjudicate (1) whether petitioners entered into a contract with the State

of New Jersey, (2) whether such contract is binding on the parties thereto, (3) whether, if not binding on the State, petitioners are nonetheless bound by the prejudicial actions taken by them, (4) if not binding on the parties thereto including petitioners, to what extent, if at all, the proofs of claim of the State of New Jersey should be allowed, (5) what order should in such event be made to restore the equivalent of the *status quo ante* as nearly as may be and (6) what in such event are the relative rights, claims, liens and priorities of the claimants in the assets of the Debtor's Estate; and that this Honorable Court may instruct petitioners whether to make on or before December 1, 1944 the additional payment on account of the taxes claimed and the additional interest payment required by Chapter 290 of the Laws of 1941, as amended by Chapter 241 of the Laws of 1942.

And your petitioners will ever pray.

Shelton Pitney, Walter P. Gardner, As Trustees of The Central Railroad Company of New Jersey.

Dated: August 12, 1944.

[fol. 80] UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Shelton Pitney, being duly sworn according to law on his oath deposes and says that he is one of the petitioners in the foregoing petition named, that he has read said petition and that the matters and things therein set forth are true, except as to those matters alleged on information and belief, and that as to such matters he verily believes the same to be true.

Shelton Pitney.

Subscribed and sworn to this 12th day of August, 1944, before me (S.) Mary A. McNamara, Notary Public, Bronx Co., No. 30, Reg. No. 45-Mc-5. Cert. filed in N. Y. Co., No. 295, Reg. No. 167-Mc-5. Commission expires March 30, 1945. (Seal.)

[fol. 84] (10) Lien, priority or preferential classification, if any, claimed for the claim, or any part thereof, the reasons therefor and full statement of the facts respecting same:

The statute of New Jersey provides that these taxes shall be a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this State (Section 9, Chapter 208, P. L. 1888, as amended and supplemented; Section 54:27-4, Revised Statutes). The lien shall take effect on June 1 of the year in which the tax is payable.

(11) The Central Railroad Company of New Jersey claim or correspondence file numbers, if any, relating to claim or any item thereof and to offsets or counterclaims:

(12) Name and address of person authorized by claimant to receive and receipt for dividends or payments:

William H. Albright, State Treasurer of New Jersey, State House, Trenton, N. J.

(13) Name and address of attorney authorized to represent claimant:

David T. Wilentz, Attorney General, State House, Trenton, N. J.

(14) If proof of claim is executed or verified by a person other than claimant, the reasons therefor and the character of the authority of the persons so executing or verifying the proof of claim are:

State of New Jersey, Name of Claimant, by (S.) Frank J. Murray, Comptroller of the Treasury of N. J. (Title.)

Dated at Trenton, N. J., December 10, 1940.

(*Be sure to execute affidavit on next page*)

[fol. 85] STATE OF NEW JERSEY,
County of Mercer, ss.:

FRANK J. MURRAY being first duly sworn, on oath deposes and says that he is the Comptroller of claimant herein; that he has been duly authorized to execute, verify

and file the foregoing proof of claim; that he has knowledge of the facts therein stated; that the same are true and correct; that said claim is justly owing from the Debtor to the claimant, and that the amount now due claimant from THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, the Debtor, on claims arising prior to October 30, 1939, after allowing all credits, offsets, and counterclaims, is $19,849,790.21 plus additional interest as claimed in answer to (2).

(S.) Frank J. Murray.

Subscribed and sworn to before me this 15th day of Dec. 1940. (S.) Owen W. Kite, Notary Public. My Commission expires Oct. —, 1944. (Seal.)

Follow instructions of the Court as stated in its Order No. 66, dated and filed October 7, 1940, to wit:

"Each claim shall be filed in triplicate with Charles E. Jaeckel, Chief Deputy Clerk at Newark, at his office, Room 347 P. O. Bldg., Newark, N. J."

[fol. 86]

Department of Comptroller of the Treasury

State of New Jersey

Statement of Railroad Taxes Fixed, Collections Thereof, and Taxes and Interest Due for Years 1932 to 1939 Both Inclusive

By the Central Railroad Company of New Jersey, Debtor

Classification of Tax and Year	Last Day Payable Without Interest	Amount of Tax	COLLECTIONS Date	COLLECTIONS Amount	Taxes Not Paid	Interest to Dec. 1, 1940	Total Tax and Interest Now Due
FIRST CLASS							
For the year 1932	Dec. 1, 1932	$ 2,372,866.16	12- 1-32	$ 720,000.00	$	$	$
			3-12-37	154,387.09			
			7- 1-40	108,553.59			
			8- 1-40	108,553.58			
			9- 1-40	108,553.59			
			10- 1-40	108,553.59			
			11- 1-40	108,553.59			
			11-30-40	75,975.07	879,736.86	1,500,843.74	2,380,579.80
1933	Dec. 1, 1933	2,145,190.95	12- 1-33	901,975.72			
			3-12-37	170,619.76			
			11-30-40	41,601.03	1,030,994.44	967,595.30	1,998,589.74
1934	Dec. 1, 1934	2,126,613.77	12- 1-34	1,137,787.28			
			1-28-37	138,180.98	850,645.51	648,399.74	1,499,045.25
1935	Dec. 1, 1935	1,987,943.48	12- 1-35	1,073,489.48	795,177.39	493,823.68	1,289,001.07
			1-28-37	119,276.61			
1936	Dec. 1, 1936	1,959,791.36	12- 1-36	1,097,483.16	862,308.20	413,907.94	1,276,216.14
1937	Dec. 1, 1937	1,874,577.67	12- 1-37	1,124,746.61	749,831.06	269,939.18	1,019,770.24
1938	Dec. 1, 1938	1,932,529.53	12- 1-38	1,159,517.71	773,011.82	185,522.84	958,534.66
[fol. 87] 1939	Dec. 1, 1939	1,706,740.27	12-27-39	1,024,044.16	682,696.11	75,994.36	758,690.47
Totals First Class Taxes		$16,106,253.19		$ 9,481,852.60	$6,624,400.59	$4,556,026.78	$11,180,427.37
SECOND CLASS							
For the Year 1932	Dec. 1, 1932	$ 1,775,908.02	12- 1-32	$1,200,000.00	$	$	$
			9-30-38	3,779.77			
			7- 1-40	41,446.41			
			8- 1-40	41,446.42			
			9- 1-40	41,446.41			
			10- 1-40	41,446.41			
			11- 1-40	41,446.41			
1933	Dec. 1, 1933	1,683,486.25	12- 1-33	705,812.04	364,896.19	545,656.22	910,552.41
			3-12-37	135,931.08			
			9-30-38	5,760.98			
			11-30-40	32,423.90			
For the Year 1934	Dec. 1, 1934	1,773,373.98	12- 1-34	948,795.87	803,558.25	758,643.22	1,562,201.47
			1-28-37	115,228.52			
			9-30-38	3,586.32			
1935	Dec. 1, 1935	1,844,197.34	12- 1-35	995,866.56	705,763.27	539,765.28	1,245,528.55
			1-28-37	110,651.84			
			9-30-38	3,730.54			
1936	Dec. 1, 1936	1,782,105.70	12- 1-36	997,979.19	733,948.40	457,145.86	1,191,094.26
			9-30-38	4,082.44			
1937	Dec. 1, 1937	1,722,325.04	12- 1-37	1,033,395.02	780,044.07	375,319.29	1,135,363.36
			9-30-38	3,595.94			
1938	Dec. 1, 1938	1,849,582.20	12 -1-38	1,103,749.69	685,334.08	247,079.86	932,413.94
			9-30-38	9,999.39			
1939	Dec. 1, 1939	1,709,181.78	12-27-39	1,025,509.07	735,833.12	176,599.95	912,433.07
					683,672.71	76,103.07	759,775.78
Total Second Class Taxes		$14,140,160.31		$ 8,647,110.22	$ 5,493,050.09	$ 3,176,312.75	*$ 8,669,362.84

* Plus Additional Interest at the Rate of 1% per Month from December 1, 1940 to Date of Payment.

expenses for terminal facilities and terminal operations, including taxes assessed upon a total valuation thereof far exceeding any possible capitalizable value, were so great that it could not hope to attract new capital for improvements or betterments, or, indeed, to survive, if the State could have succeeded in collecting all of the taxes claimed together with all of the interest claimed thereon, so that even if the State could have exacted its pound of flesh it would have deprived a large number of its citizens of that railroad service which it is its purpose to insure.

27. The foregoing considerations for Chapter 290 of the Laws of 1941 were also consideration for Chapter 241 of the Laws of 1942, and as will more fully and at large appear by reference to paragraphs 18 to 21, inclusive hereof, substantial additional benefits to the State and detriments to petitioners and to the Debtor's estate flowed from the enactment of said Chapter 241 and petitioners' compliance therewith.

[fol. 76] 28. The settled law of the State of New Jersey for many decades prior to the decision in *Wilentz* v. *Hendrickson*, hereinabove cited, had been, and at the time of the enactment of Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942 and when petitioners accepted the statutory offer made by the State was, that interest on unpaid taxes was not a part of the tax in which the State had any vested right, but was a method of enforcing the payment and was in the nature of a remedy for its non-payment; and that control thereover was within the province of the Legislature.

29. Petitioners allege that their contract was valid when made both for the reason that as a matter of law the State did not agree to appropriate or part with any sum whatsoever in which it had a vested interest and that as a matter of fact it received both good and valuable and moral or equitable consideration for that which it did agree to do,—or for either of said reasons. Petitioners are advised that a contract valid when made cannot be impaired by a subsequent change in judicial decision and that this would be true as to their contract even had they been parties to the proceeding in which such change occurred. Petitioners show however that only officers and agents of

their adverse tax claimant were parties to the litigation hereinabove referred to and that the changed judicial decision is in nowise controlling on petitioners or this Honorable Court.

30. The State of New Jersey has not offered to restore the *status quo ante* either in whole or in part. On the contrary its officers and agents assert not only that the case of *Wilentz* v. *Hendrickson*, hereinabove cited, is binding upon petitioners notwithstanding the matters and things herein alleged but that petitioners are none the less [fol. 77] bound on their part by their actions taken under the contract. Thus this claimant demands the fruits of changed judicial decision and of a finding of fact in a proceeding to which its officers and agents refrained from making petitioners parties together with the fruits of all action taken by petitioners in reliance on and compliance with its legislative action. Moreover the State has threatened and is threatening to make huge tax claims against the Debtor's Estate for the tax years 1932 to 1940, inclusive, in addition to and in excess of the amounts demanded and set forth in its proofs of claim for the years 1932 to 1939, inclusive, and the previously claimed balance of $1,321,285.27 for the year 1940. It has also threatened and is now threatening to deny the validity of the provision of Section 4 of Chapter 290 of the Laws of 1941 as amended by Chapter 241 of the Laws of 1942 which provided that from and after December 1, 1940 petitioners would be required annually to pay interest at the rate of 3% per annum on the unpaid balances and installments of the principal amount of taxes claimed by the State. The State has threatened and is now threatening also to deny that the various actions taken by petitioners in acceptance of and compliance with the aforesaid legislation and in compliance with the orders of this Court are to be given effect as of the time said actions were taken by petitioners or at all. Petitioners are advised that these last mentioned threats of new claims never previously asserted by the State against petitioners and in various respects wholly inconsistent with the State's previous position are and will remain of academic importance unless and until this Honorable Court has adjudged not only that the State is not bound by its contract with petitioners but also that petitioners are on their part bound thereby. If, however, this Honorable Court should adjudge upon a

[fol. 81] UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Walter P. Gardner, being duly sworn according to law on his oath deposes and says that he is one of the petitioners in the foregoing petition named, that he has read said petition and that the matters and things therein set forth are true, except as to those matters alleged on information and belief; and that as to such matters he verily believes the same to be true.

Walter P. Gardner.

Subscribed and sworn to this 12th day of August, 1944, before me (S.) Mary A. McNamara, Notary Public, Bronx Co., No. 30, Reg. No. 45-Mc-5. Cert. filed in N. Y. Co., No. 295, Reg. No. 167-Mc-5. Commission expires March 30, 1945. (Seal.)

[fol. 82] SCHEDULE A

Proof of Claim No. 38

PROOF OF CLAIM ARISING PRIOR TO OCTOBER 30, 1939

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

(To be executed and filed in triplicate)

(1) Name, address and business of claimant.

State of New Jersey, State House, Trenton, N. J.

(2) Total amount of claim:

$12,117,450.68 taxes, plus interest thereon in the sum of $7,732,339.53, plus additional interest on said unpaid taxes from December 1, 1940 to date of payment.

(3) Detailed statement of claim showing nature of claim and of each item thereof, the consideration therefor, and the dates of accrual and the amounts of each item, with such details as shall definitely advise the Trustees of the par-

ticulars thereof, and distinguish the claim from other claims of like nature:

(Attach rider or other sheets, if necessary.)

Said claim represents unpaid balances of taxes assessed and levied by the State of New Jersey upon property and franchises of the Debtor for the years 1932 to 1939, both inclusive (pursuant to "An act to revise and amend 'an act for the taxation of railroad and canal property' approved April 10, 1884," approved March 27, 1888, its amendments and supplements and Chapters 19 to 29, both inclusive, of Title 54, [fol. 83] Revised Statutes,) as detailed in the annexed writings marked schedule "A" and schedule "B". Under said statute all taxes not paid on December 1, of the year for which same are assessed and levied shall bear interest from December 1 of said year until payment.

(4) Security or lien, if any, for said claim:

Answered in (10) below.

(5) Copies of original documents. (Original promissory notes, contracts, orders, or other written documents, if any, on which claim is based should be copied and the copies attached to each copy of proof of claim):

(6) Partial payments, if any, heretofore made:

$18,128,962.82. All partial payments shown in detail in Schedules "A" and "B" attached.

(7) Details and amounts of offsets or counterclaims due to the Debtor or the Trustees against said claim:

No offsets or counterclaims.

(8) Net amount due claimant:

$19,849,790.21, plus additional interest as indicated in (2).

(9) Court, title and number of suit or proceeding, if any, in which said claim is involved or pending; whether judgment has been recovered thereon, and if so, date and amount of such judgment:

See writing attached hereto, marked "Schedule C".

[fol. 88] SCHEDULE "C"

Paragraph 9 of Claim

Following is a statement of the Courts and reviewing agencies, title and number of suit or proceedings in which the assessments, taxes, and interest thereon for the several years involved in this claim have been and are now in litigation.

1932 and 1933 Assessments, Taxes and Interest

(a) Reviewed on appeal to and sustained by the State Board of Tax Appeals. 1932 case unreported. 1933 case recorded in N. J. B. T. A. Rep. 1912-1934, 675; 57 N. J. L. J. 115.

(b) 1933 tax reviewed on certiorari by the New Jersey Supreme Court and sustained. 114 N. J. L. 69.

(c) 1933 tax reviewed on Bill in Equity by the United States District Court, District of New Jersey. Bill dismissed on final hearing by final decree entered March 6, 1937. No. E-5050. Decision reported as Central R. R. Co. *v.* Martin, 19 Fed. Supp. 82 (merits decided on same record reported as Lehigh Valley R. Co. *v.* Martin, 19 Fed. Supp. 63).

(d) Foregoing decree affirmed by United States Circuit Court of Appeals, Third Circuit, No. 6438; reported under Erie Railroad Company *v.* J. H. Thayer Martin, et al., 100 Fed. (2d) 139. Application to United States Supreme Court for writ of certiorari denied, 59 S. Ct. 592; 83 L. Ed. 1049. Rehearing denied, 59 S. Ct. 784; 83 L. Ed. 1063.

[fol. 89] *Schedule "C"—Paragraph 9 of Claim*

1934, 1935 and 1936 Assessments, Taxes and Interest

(a) Reviewed on appeal to and sustained by State Board of Tax Appeals. The 1936 tax decision unreported. The 1934 and 1935 decisions reported in N. J. B. T. A. Rep. 1934-1939, 83, 231.

(b) Injunctions restraining collection of part of the taxes decreed by United States District Court, District

of New Jersey. Opinion reported under title Central R. R. Co. of N. J. *v.* Martin, State Tax Commissioner, et al., 30 Fed. Supp. 41. These decrees were appealed to the United States Circuit Court of Appeals, Third Circuit, were argued before that Court on October 21, 1940. Judgments of District Court reversed. Opinion filed November 27, 1940.

1937, 1938 and 1939 Assessments, Taxes and Interest

(a) Same were appealed to the State Board of Tax Appeals, but as yet have not been determined by that body.

[fol. 90]

SCHEDULE B

Objections to Proof of Claim No. 38

Name of Claimant:

State of New Jersey.

Address:

State House, Trenton, New Jersey.

Basis of Claim:

This claim, amounting to $12,117,458.68 plus interest thereon in the sum of $7,732,339.53, plus additional interest on the total of said sums from December 1, 1940, is alleged to represent unpaid balance of taxes levied by the State of New Jersey upon the property of the Debtor for the years 1932 to 1939 inclusive.

Objections:

The Debtor and the Trustees of the property thereof, jointly and in the alternative, expressly reserving all rights of the Debtor and of the Trustees in respect of said claim, including the right to amend this objection and to make more definite any part thereof, object to the above claim on the following grounds, hereby denying each and every affirmation of the Proof of Claim inconsistent herewith,—

As to Taxes Generally for the Years 1932 to 1939, Inclusive

As the State's Proof of Claim shows, the Debtor has already paid to the State over $18,128,000 on account of

the taxes levied against it for the years 1932 to 1939, inclusive. The Debtor and the Trustees allege that the taxes lawfully levied against the Debtor for said respective years [fol. 91] have been paid in full and they object to the claim now asserted on the ground that the additional amounts claimed are wholly unlawful and void because based upon assessments that are excessive, discriminatory, arbitrary and unlawful, for the following reasons,—

(a) The State Tax Commissioner in making the assessments failed and refused to give any weight to the drastic and permanent decline in the earnings of the Debtor resulting not only from the depression but from radical changes in the transportation industry which became apparent by the year 1931.

(b) Said Commissioner failed and refused to consider and give any weight to the fact that said railroad properties in the State of New Jersey are by operation of law dedicated to public use for transportation purposes and are therefore subject to intensive public regulation as to control, operation and earnings under the Acts of Congress and of the State Legislature.

(c) Each item of land included in the assessment was grossly over-valued by having ascribed to it the excessive valuation of adjacent land devoted to other uses and without regard to the peculiar status and function of the Debtor's land as a part of a railroad system, or to its true value, in disregard of the State Law as defined by the Courts of New Jersey. A substantial element in the valuation of much of the land adjacent to the Debtor's land is its accessibility to the railroad and yet the Tax Commissioner in assessing the railroad land indulged in the fiction that the railroad land might be marketed in separate parcels valued according to adjacent land values which obviously would not survive abandonment of the railroad.

(d) Each structure was valued independently according to its cost less depreciation, and in complete disregard [fol. 92] of its present market value or true value as a part of an operating railroad property.

(e) The method of assessment of Debtor's property followed by the State Tax Commissioner in making the assessments for the years 1932 to 1939, inclusive, was unlawful

and arbitrary in that while for many years prior thereto, when the sum of the valuations ascribed to the tangible items of the property was deemed to be less than the true value of the total property in New Jersey, a corrective was added representing "remaining value including the franchise"; but in making the assessments for the years 1932 to 1939, respectively, when the true value of the Debtor's property in New Jersey as a whole was less than the sum of the valuations ascribed to the separate items of tangible property, no corrective deduction was made.

(f) The State Tax Commissioner failed and refused to consider and give any weight to the fact that the many separately inventoried items of porperty comprising the Debtor's railroad system in the State of New Jersey constitute a public service unit which is not susceptible to disintegration, sale or disposal by parcels or items.

(g) In assessing each parcel of land and each structural item included in said property, the State Tax Commissioner disregarded the fact that the sale, disposal or encumbrance of the property constituting Debtor's railroad facilities is rigidly restricted by law.

(h) The said assessment of Debtor's properties was unjustly and illegally discriminatory and involved a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution in that said assessment was in excess of the true value thereof, while other real property generally in the State of New Jersey, excepting property of railroad companies, is customarily, [fol. 93] notoriously, intentionally and systematically assessed for taxation at not more than 80% of the ascertainable value thereof; and while the personal property of the Debtor, including its locomotives, cars and other equipment, was assessed in excess of true value, the personal property of taxpayers other than railroads is generally, notoriously, systematically and intentionally omitted from taxation, and when taxed, is systematically and intentionally assessed for taxation at less than half of the ascertainable value thereof.

(i) The said tax levy on Debtor's property was arbitrary and illegally discriminatory and involved a denial of due process and of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution, in that while all of the railroad property of the

Debtor in the State of New Jersey, other than its second class railroad property, was subject to the "average tax rate" computed as provided by Revised Statutes 54:24-2 and 54:24-3, said average tax rate as computed and applied by the Tax Commissioner in fixing the tax levy on the Debtor's property was grossly inflated in disregard of said statutes. As stated in the preceding paragraph, real and personal property, other than railroad property, generally throughout the State was assessed at substantially less than true value, yet the Tax Commissioner computed the "average tax rate" which was used in fixing each of the tax levies referred to in the Proof of Claim by dividing the total taxes levied on real and personal property in all of the taxing districts throughout the State, by the aggregate *assessed value* of all locally assessed real and personal property including second class railroad property instead of by dividing said total taxes levied by the aggregate *true value* of all such locally assessed property.

(j) By reason of the erroneous, excessive and arbitrary valuation as aforesaid of the said railroad properties per- [fol. 94] sisted in over a period of years the said assessments constitute a constructive fraud and the levying and imposing of taxes thereon based upon such erroneous, fraudulent, excessive and unlawful valuations, deprive the Debtor of its property without due process of law and deny the equal protection of the laws in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

(k) The said assessments of Debtor's property for each of said years were grossly in excess of its true value in direct contravention of Article IV, Section VII, Paragraph 12, of the Constitution of the State of New Jersey, which requires that

> "Property shall be assessed for taxes under general laws and by uniform rules according to its true value."

(l) Since the Debtor is an important agency of interstate transportation, the said assessments of Debtor's property for each of said years, to the extent that they are in excess of true value, constitute an interference with and burden upon interstate commerce, in violation of the provi-

sions of Article 1, Section VIII of the Constitution of the United States.

(m) As shown by the record in this proceeding (printed record pp. 1 to 6), the additional taxes now claimed by the State of New Jersey constituted one of the chief reasons why the Debtor was compelled to seek relief under the Bankruptcy Act and as further shown by the record (printed record 1091 to 1139), the alleged current as well as accrued tax liability of the Debtor to the State of New Jersey precludes the formulation by the Debtor of any plan of reorganization, as contemplated by Section 77 of the Bankruptcy Act. The Debtor, therefore, alleges that [fol. 95] to the extent that the assessments on its property by the State of New Jersey referred to in the Proof of Claim are in excess of true value, they constitute an interference with the exercise by Congress of its bankruptcy powers, in violation of Article I, Section VIII, Paragraph 4 of the Constitution of the United States.

(n) The State Tax Commissioner and the New Jersey State Board of Tax Appeals in reviewing the assessments for the years 1932 to 1936, inclusive, and the New Jersey Supreme Court in reviewing the assessments for the year 1933 arbitrarily excluded from the evidence considered or refused and neglected to consider and give any weight to, the evidence submitted by the Debtor showing that the assessments in question were grossly excessive, discriminatory, arbitrary and unlawful.

(o) As to the assessments for the years 1934, 1935 and 1936, this Court, by its Order No. 83, has reserved for further decision the question whether a petition for a writ or writs of certiorari should be filed with the United States Supreme Court respecting the decision of the Third Circuit Court of Appeals dated November 27, 1940, which is referred to in the State's Proof of Claim.

(p) As to the assessments for the years 1937, 1938 and 1939 appeals were promptly filed by the Debtor with the New Jersey State Board of Tax Appeals and they are still pending undetermined.

(q) Notwithstanding the various proceedings referred to in the Proof of Claim relating to the assessments for each of the years involved, all of the questions raised by

the Proof of Claim and by these objections thereto as to the amount and legality of the taxes claimed are for the determination of this Court under Section 64(a) of the Bankruptcy Act.

[fol. 96] (r) The assessments for each of the years involved are for the reasons above stated or one or more of them and in other respects arbitrary, unconstitutional and illegal and the statutes under which they were made as construed and applied in making said assessments are unconstitutional and illegal.

As to Interest

1. The claimant is not entitled to collect any interest on the balances of taxes alleged to be due from the Debtor, or any part thereof, after the date when the Debtor filed its Petition in Bankruptcy, to wit, October 30, 1939.

2. If the claimant is entitled to collect any interest on said balances, or on any part thereof, after October 30, 1939, the rate of interest is limited to the legal rate fixed by the Laws of the State of New Jersey, to wit 6% per annum, instead of the rate 1% per month from October 30, 1939, to the date of payment as asserted in the Proof of Claim.

3. The taxes due from the Debtor to the State of New Jersey prior to October 30, 1939, having been paid in full prior to said date, no further amount is due for the alleged balances of taxes, or any part thereof, or for interest alleged to be due on said balances, or for any part thereof.

4. Even if any part of the alleged balances of taxes for any of said years were ultimately found to be due, no interest would accrue thereon during the period or periods that the collection thereof was enjoined in a judicial proceeding in which the Debtor was, in good faith, contesting the validity thereof, and as to the taxes for the years 1937, 1938 and 1939 no interest has accrued because the question as to the lawful amount of the assessments for those years is still pending on appeal before the State Board [fol. 97] of Tax Appeals, and no delinquency in payment of a tax can arise until there has been an administrative determination of the amount of tax lawfully due.

Wherefore, said Debtor and Trustees pray that said claim and each part thereof be wholly disallowed.

Dated: February 27, 1941.

The Central Railroad Company of New Jersey by Shelton Pitney and Walter P. Gardner, Trustees; and Shelton Pitney and Walter P. Gardner, Trustees of the Property of the Central Railroad Company of New Jersey, By Shelton Pitney, Walter P. Gardner, Trustees.

To: David T. Wilentz, Esq., Attorney General, State House, Trenton, N. J.

[fol. 98] SCHEDULE C

FINAL DECREE—Filed September 28, 1943

This cause being opened to the Court by David T. Wilentz, Attorney-General of New Jersey, informant, solicitor *pro se*, in the presence of Herbert J. Hannoch, solicitor of the defendant;

And it appearing that a stipulation, dated September 28, 1943, has been entered into by the parties and filed in Court;

And the Court, at final hearing, having duly considered such stipulation and having fully considered the evidence submitted and the arguments of counsel;

And it appearing to the Court upon such consideration that Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942 are in contravention of Article I, Section 20, of the Constitution of the State of New Jersey;

It is therefore, on this twenty-eighth day of September, 1943,

Ordered, Adjudged and Decreed

1. That Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942 are in contravention of Article I, Section 20, of the Constitution of the State of New Jersey, and are null and void.

2. That the defendant, Robert C. Hendrickson, State Treasurer, his successors in office and his and their respective agents and servants, be and they are hereby each, severally, permanently restrained and enjoined from carry-

ing out or executing any and all of the provisions of Chapter 290 of the Laws of 1941 and of Chapter 241 of the Laws of 1942, and from accepting from any railroad taxpayer any acceptance documents, discharges or dismissals, dis-
[fol. 99] continuances checks or other forms of payment which may be delivered to him or them or which were heretofore delivered to him or them in purported compliance with Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, and from depositing any such checks or other forms of payment or distributing the proceeds thereof.

Respectfully advised, Luther A. Campbell, C., Wilfred H. Jayne, V.-C.

I hereby approve the foregoing final decree as to form only.

Herbert J. Hannoch, Solicitor of the Defendant;
Robert C. Hendrickson, State Treasurer.

[fol. 100] In United States District Court

Special Appearance of Walter D. Van Riper, Attorney General of the State of New Jersey, for the Sole Purpose of Objecting to the Jurisdiction of the Court to Entertain "Petition for Adjudication Concerning New Jersey State Tax Claims and for Order No. —," —Filed by the Trustees Herein on August 12, 1944.

Walter D. Van Riper, Attorney General of the State of New Jersey, having been served with a printed form of petition entitled "Petition for Adjudication Concerning New Jersey State Tax Claims and for Order No. —," which said petition is signed by Shelton Pitney and Walter P. Gardner, trustees of the property of the debtor, and is dated August 12, 1944, does herewith specially appear in response to said petition for the sole purpose of interposing an objection to the entertainment of the said petition by this Honorable Court, on the ground that same constitutes the prosecution of a suit, claim or demand against the State of New Jersey by a citizen or citizens of the State of New Jersey, and that the judicial power of the courts of the United States does not, under the Constitution of the United States, extend to any suit, claim or demand brought or instituted against the State of New Jersey, either by the

debtor railroad company, a corporation of New Jersey, or by the petitioning trustees, residents of the State of New Jersey, and in respect of such objection Walter D. Van Riper, Attorney General of the State of New Jersey, more particularly shows as follows:

1. Said petition appears upon its face to pray, as against the State of New Jersey, for an order adjudging and determining that the State of New Jersey has entered into a valid and subsisting contract with the trustees under and by virtue of Chapter 290 of the Laws of 1941, and Chapter 241 of the Laws of 1942, (which said laws have been adjudged null and void in and by a final decree of the New [fol. 101] Jersey Court of Chancery by the terms of which the execution or consummation of said laws on behalf of the State was permanently enjoined, a copy of which decree, which has been affirmed by the New Jersey Court of Errors and Appeals is annexed to the said petition of the trustees as schedule C); by reason of which the trustees claim that the tax debt of the debtor and of the trustees due to the State of New Jersey, and the State's lien therefor, have in somewise been affected, altered, modified or destroyed.

In said respect the petition is, therefore, the maintenance of a suit, claim, or demand against the State of New Jersey by citizens thereof, beyond the judicial power or jurisdiction of any court of the United States to entertain, as aforesaid.

2. Said petition appears upon its face to assert the existence of equitable rights, privileges and immunities of the debtor and of the trustees as against the State of New Jersey, and to request from this Honorable Court equitable adjudications and determinations with respect to the tax obligations of the debtor and of the trustees to the State of New Jersey, for which the State has liens, which adjudications and determinations do or may affect such tax obligations or liens lawfully assessed and imposed against the debtor and the trustees by the duly constituted taxing authorities of the State of New Jersey under the laws of the State.

In said respect the petition is, therefore, the maintenance of a suit, claim, or demand against the State of New Jersey, by citizens thereof, beyond the judicial power or jurisdiction of any court of the United States to entertain, as aforesaid.

3. The said petition appears in divers other respects to invoke the supposed jurisdiction of this Honorable Court to [fol. 102] enter determinations and adjudications which may or will affect, modify, impair or destroy the tax obligations owing by the debtor and by the trustees herein to the State of New Jersey, and the liens of the State therefor, and in said respects the filing of the petition and the prosecution thereof constitute a suit, claim, or demand against the State of New Jersey, by citizens thereof, beyond the judicial power of the courts of the United States to entertain, as aforesaid.

Wherefore, the said Walter D. Van Riper, Attorney General of the State of New Jersey, appearing specially as aforesaid, moves this Honorable Court that the said petition shall be dismissed insofar as same prays for or seeks an adjudication or determination that the claims of the State of New Jersey for taxes and interest thereon are less than such sums as have been assessed against the debtor and the trustees by the duly constituted authorities of the State, or have lawfully accrued, pursuant to the laws of the State; and insofar as the liens of the State for such taxes and interest are sought in anywise to be altered, affected, modified or destroyed, by any such adjudication or determination.

Respectfully submitted, Walter D. Van Riper, Attorney General of the State of New Jersey, appearing specially.

[fol. 103] IN UNITED STATES DISTRICT COURT

ORDER NO. 250 RE-REFERRING TO SPECIAL MASTER THE DISPUTED TAX CLAIMS OF THE STATE OF NEW JERSEY, ALL EXISTING OR ADDITIONAL OBJECTIONS THERETO AND THE STATE'S REPLY TO SAID OBJECTIONS, AND ALSO REFERRING THE STATE'S MOTION TO DISMISS THE TRUSTEES' PETITION DATED AUGUST 12, 1944 FOR AD-UDICATION OF SAID CLAIMS.

The Trustees of the Debtor having filed herein a petition, dated August 12, 1944, for an adjudication concerning New Jersey State tax claims, and it appearing to the Court that on December 10, 1940 there were filed on behalf of the State of New Jersey proofs of claim as set forth in paragraphs 8 and 9 of said petition of the Trustees, and that the Trustees filed objections to said proofs of

claim as set forth in paragraph 10 of said petition of the Trustees, and that on March 26, 1941 the State of New Jersey filed a reply to said objections to proofs of claim so filed by the Trustees; and it appearing further that this Court, on April 1, 1940, entered Order No. 93, referring said proofs of claim to Augustus C. Studer, Jr. Esq., as Special Master, which Order of Reference was revoked by Order No. 163 in these proceedings; and it appearing further that there have been various subsequent developments, as set forth in said petition of the Trustees dated August 12, 1944, which involve questions of fact and questions of law and mixed questions of fact and law; and the State of New Jersey, by its Attorney General, having purported to appear specially to said petition of the Trustees dated August 12, 1944 and challenged the jurisdiction of this Court in the premises on the ground that it may not be sued without its consent and that it has not consented to be sued as more fully set forth in the State's motion to dismiss; and it having been represented by the Trustees and Intervenors to the Court that there are questions of fact which have or may have a bearing on [fol. 104] said special appearance by the State of New Jersey and upon the question whether this Court has jurisdiction in the premises; and it further appearing that adjudication with respect to this Court's jurisdiction and, if jurisdiction there be, upon the issues presented by the State's proofs of claim, the Trustees' objections thereto and the State's reply to said objections must be made as expeditiously and promptly as possible in order that the reorganization proceedings of the Debtor may be progressed and terminated as soon as possible; and this Court having considered all of the facts alleged in said petition of August 12, 1944 of the Trustees, and in said special appearance of the Attorney General of the State of New Jersey, and having heard all of the parties,

It Is, on this 16th day of October, 1944, on motion of the Trustees, Ordered:

1. That all tax claims filed by the State of New Jersey, the Trustees' objections thereto and the State's reply to said objections, and also the aforesaid purported special appearance of the State objecting to the jurisdiction of this Court filed herein on August 28, 1944 be and the same

are Hereby Referred and Re-Refered to Augustus C. Studer, Jr., Esq., as Special Master, for hearing and report theeron.

2. That the said Special Master be and he hereby is directed to take testimony and hear argument, make findings of fact, adopt conclusions of law and submit the same to the Court as his report, either with or without opinion, as said Special Master may consider necessary, calling to his aid, if he deems it advisable, a stenographer, to the end that the testimony may be taken and transcribed and filed; that said Special Master shall regulate the proceedings and all hearings before him, shall have full authority [fol. 105] to examine the parties upon, or in regard, to, any matter arising before him in pursuance to this order of reference, and, also to secure by subpoena and subpoena *duces tecum*, the appearance of witnesses and the production of documents; to examine on oath all witnesses produced by the parties before him or to require the taking of testimony by deposition in accordance with the Acts of Congress and the General Orders in Bankruptcy; and to direct the mode in which the matters requiring evidence shall be proved before him; and the form and contents of the report, with opportunity for objections thereto, shall be as provided by the rules of this Court.

3. That the Trustees or any party to this proceeding may within such time as the Master may prescribe file amended, revised, supplemental or additional objections to the proofs of claim heretofore filed by the State of New Jersey, as aforesaid, and that the State of New Jersey, without prejudice to its purported special appearance aforesaid, may within such time as the Master may prescribe file such amended, revised, supplemental or additional reply as it may be advised to any such objections.

4. That this Court hereby reserves the right to revise, alter and amend this order.

Guy L. Fake, United States District Judge.

Filed: October 6, 1944.

[fol. 106] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 31, 1944

To The Central Railroad Company of New Jersey, Debtor, and Shelton Pitney and Walter P. Gardner, Trustees of The Central Railroad Company of New Jersey, Debtor, Central Hanover Bank and Trust Company, Trustees of the Debtor's General Mortgage, Institutional Group of Lienors, Brooks Committee of Bondholders, and To Whom It May Concern:

SIRS:

Notice is hereby given that the State of New Jersey, by Walter D. Van Riper, Attorney General, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the whole of the Order of the Court No. 250, entered in these proceedings on October 16, 1944, which order is entitled "Order No. 250 Re-Referring to Special Master the Disputed Tax Claims of the State of New Jersey, All Existing or Additional Objections Thereto and the State's Reply to Said Objections, and Also Referring the State's motion to Dismiss the Trustee's Petition dated August 12, 1944 for an Adjudication of Said Claims."

Walter D. Van Riper, Attorney-General for State of New Jersey, Appellant.

Dated: October 30, 1944.

[fol. 107] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AND AMENDED OBJECTIONS AND DEFENSES OF DEBTOR'S TRUSTEES TO CLAIMS FILED BY THE STATE OF NEW JERSEY

A. To. Claim No. 38 for $19,849,790.21

(The Central Railroad Company of New Jersey)

1. Claim No. 38 for $19,849,790.21 is in an amount which exceeds by $7,732,339.53 plus $66.76* the maximum

---

* The item of $66.76 represents a minor adjustment made by the State Board of Tax Appeals for the tax year 1937, while the item of $7,732,339.53 represents the State's claim for interest penlties at 1% per month to December 1, 1940.

amount which the State of New Jersey may lawfully claim to be due under or by virtue of its Statutes viz., Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, with which Statutes the undersigned Trustees of the Debtor have duly complied pursuant to orders of this Bankruptcy Court.

2. The difference amounting to $12,117,383.92, plus a balance of $1,321,285.27 claimed by the State of New Jersey to be due from the Trustees on account of taxes purportedly assessed for the tax year 1940, making a total of $13,438,669.19, became and is payable not, as claimed, at one time or in one payment, but in installments, in the amounts, at the times, upon the terms and in the manner prescribed by said Statutes.

3. The Trustees have paid on account of said sum of $13,438,669.19 or have duly tendered payment of the sum of $2,432,352.91. The balance of $11,006,316,28 is payable in installments, in the amounts, at the times and upon the terms and in the manner so prescribed.

4. By the provisions of said Statutes any remedy of or proceedings by the State of New Jersey to collect any [fol. 108] part of said claim is now and will hereafter continue to be stayed and suspended as long as the Trustees and their successor or successors make the required installment payments in the amounts, at the times, upon the terms and in the manner so prescribed.

5. Alternatively, if the State of New Jersey contends herein that its aforesaid Statutes are without force or effect as applied to the Trustees and to the Debtor's Estate and such contention is allowed and sustained, then for the reasons and upon the grounds set forth in paragraphs 6 and 7 hereof and in the Trustees' "Objections to Proof of Claim No. 38" dated February 27, 1941 (which objections are hereby incorporated herein by reference thereto), the following portions of Claim No. 38 and the State's claim in respect of the year 1940 must be disallowed:

Tax Year	*Total Tax and Interest Claimed*
1934	$2,744,573.80
1935	2,480,095.33
1936	2,431,579.50

1937	1,952,117.42
1938	1,870,967.73
1939	1,518,466.25
1940	1,321,285.27
Total	$14,319,085.30*

* And, as well, the additional interest claimed by the State at the rate of 1% per month from December 1, 1940.

6. The State's last mentioned tax claims are predicated upon its application to other than second class property of an "average tax rate" and the application to second class [fol. 109] derived from computations based upon under-property of various and sundry local tax rates which were valuation of other taxable property and failure to value still other taxable property, which undervaluations, and omissions were in violation of the Constitution and Statutes of the State of New Jersey. Said tax rate were grossly inflated because of the intentional, systematic and fraudulent under-assessment of real estate taxable under the General Tax Act and the intentional, systematic and fraudulent under-assessment and non-assessment of personal property taxable under said General Tax Act, and particularly the notorious omission to include intangible personal property in the ratables taxed under said Act (except sporadically and fractionally in a very few of the hundreds of taxing districts of the State, the intangible personal property of a few corporations or estates). The State of New Jersey and its agents failed to correct said unlawful under assessment and non-assessment of property under the General Tax Act notwithstanding legislative, executive and administrative recognition of such unlawful practices; and the statutes of the State enacted to correct said abuses were not carried into effect and became dead letters. Such exclusion of intangible personal property and under-assessment of other property generally and the State's failure to make effective its corrective or "equalization" statutes resulted in the use of false, unlawful and grossly deflated denominators in striking the tax rates applicable to the Debtor and to its Trustees, and thereby in the levy of taxes against it and them in violation of the Constitution and statutes of the State.

7. Debtor and its Trustees were and are without adequate remedy in the courts of the State of New Jersey for the aforesaid unlawful method of taxation and unlawful tax rate bases under the interrelated statutes, the General Tax Act and the Railroad Tax Act. The aforesaid viola- [fol. 110] tions of the Constitution and the statutes of the State, the failure of said corrective or "equalization" statutes to correct and the action of the State in seeking nevertheless to enforce and collect its aforesaid tax claims based on such grossly, unlawfully and admittedly inflated tax rates, without affording an adequate remedy therefor, threatened to deprive the Debtor of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

8. Upon the hypotheses stated in paragraph 5 hereof the Trustees have paid to the State and the State has accepted the sum of $239,749.80 on account of the State's claims in addition to the sum of $2,432,352.91 paid or duly tendered as hereinbefore in paragraph 3 set forth. Furthermore, in compliance with the instructions of this Bankruptcy Court and the provisions of said Statutes the Trustees have tendered on account of the State's claims the following sums on the following dates respectively:

Date of Check	*Amount*
August 8, 1941	$279,939.37
June 12, 1942	340,816.69
November 30, 1942	173,862.60
December 1, 1943	350,717.95
Total	$1,145,336.61

9. As to that portion of the State's claim which is for interest:

(a) In no event can such claim be allowed for the period commencing October 30, 1939 in an amount in excess of interest at the rate of 6% per annum to December 1, 1940 and 3% per annum thereafter on such unpaid principal balances of the State's tax claims as [fol. 111] may be allowed (less the interest payments heretofore made or duly tendered by the Trustees);

(b) The claim for interest penalties at the rate of 1% per month for the periods during which the State's

tax claims were being contested in good faith and collection was enjoined by judicial decree or statute is a claim for penalties which must be disallowed under and by virtue of Section 57(j) of the Bankruptcy Act (11 U. S. C. A. Section 93(j)); and

(c) The State is without any lien for any such interest claim as may be allowed;

(d) No interest is payable as to any amounts of principal of taxes claimed to the extent that the claim for such principal is disallowed or to the extent of the amounts heretofore paid or tendered under the Settlements Acts and the orders of the Bankruptcy Court.

10. The State is without any lien upon the Debtor's or the Trustees' personal property.

B. To Claim No. 34 for $10,369.88

(Ogden Mine Railroad Company)

1. Claim No. 34 for $10,369.88 is in an amount which exceeds by $5,149.19 the maximum amount which the State of New Jersey may lawfully claim to be due under or by virtue of its Statutes, viz., Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, with which Statutes the undersigned Trustees of the Debtor have duly complied pursuant to orders of this Bankruptcy Court.

[fol. 112] 2. Following the enactment of said Statutes the Trustees on or about August 11, 1941 paid the full principal amount of taxes claimed of $5,220.69, plus an additional sum of $555.54 the principal amount of taxes for the year 1940, plus $120.32 interest prescribed by said Chapter 290 of the Laws of 1941, and on June 15, 1942, in compliance with said Chapter 241 of the Laws of 1942, paid an additional amount for interest in the sum of $146.50.

3. Alternatively, upon the hypotheses stated in paragraph 5 of part "A", *supra*, the allegations of paragraphs 6, 7 and 9(a), (c) and (d) thereof are hereby repeated and the Trustees' "Objections to Proof of Claim No. 34" filed February 27, 1941 are hereby incorporated herein by reference thereto.

4. No balance is due the State under Claim No. 34.

C. Claim No. 35 for $458,800.35

(New York and Long Branch Railroad Company)

1. Claim No. 35 for $458,800.35 is in an amount which exceeds by $140,495.05 the maximum amount which the State of New Jersey may *un*lawfully claim to be due under or by virtue of its Statutes, viz., Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, with which Statutes the undersigned Trustees of the Debtor have duly complied pursuant to orders of this Bankruptcy Court.

2. Following the enactment of said Statutes the Trustees on or about August 11, 1941 paid the full principal amount of taxes claimed of $318,305.30, plus an additional sum of $59,981.90 the principal amount of taxes for the year 1940, plus $7,877.38 interest prescribed by said Chapter 290 of the Laws of 1941, and on June 15, 1942, in com-
[fol. 113] pliance with said Chapter 241 of the Laws of 1942, paid an additional amount for interest in the sum of $9,452.00.

3. Alternatively, upon the hypotheses stated in paragraph 5 of part "A", *supra*, the allegations of paragraphs 6, 7 and 9(a), (c) and (d) thereof are hereby repeated and the Trustees' "Objections to Proof of Claim No. 35" filed February 27, 1941 are hereby incorporated herein by reference thereto.

4. No balance is due the State under Claim No. 35.

D. To Claim No. 36 for $22,939.09

(Dover and Rockaway Railroad Company)

1. Claim No. 36 for $22,939.09 is in an amount which exceeds by $9,302.82 the maximum amount which the State of New Jersey may lawfully claim to be due under or by virtue of its Statutes, viz., Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, with which Statutes the undersigned Trustees of the Debtor have duly complied pursuant to orders of this Bankruptcy Court.

2. Following the enactment of said Statutes the Trustees on or about August 11, 1941 paid the full principal amount of taxes claimed of $13,636.27, plus an additional sum of $1,549.17 the principal amount of taxes for the

year 1940, plus $316.35 interest prescribed by said Chapter 290 of the Laws of 1941, and on June 15, 1942, in compliance with said Chapter 241 of the Laws of 1942, paid an additional amount for interest in the sum of $385.09.

3. Alternatively, upon the hypotheses stated in paragraph 5 of part "A", *supra*, the allegations of paragraphs 6, 7 and 9(a), (c) and (d) thereof are hereby repeated and the Trustees' "Objections to Proof of Claim No. 36" filed [fol. 114] February 27, 1941 are hereby incorporated herein by reference thereto.

4. No balance is due the State under Claim No. 36.

E. To Claim No. 37 for $9,129.90

(Bay Shore Connecting Railroad Company)

1. Claim No. 37 for $9,129.90 is in an amount which exceeds by $3,601.50 the maximum amount which the State of New Jersey may lawfully claim to be due under or by virtue of its Statutes, viz., Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, with which Statutes the undersigned Trustees of the Debtor have duly complied pursuant to orders of this Bankruptcy Court.

2. The principal amount of taxes claimed, plus the taxes for the year 1940, plus all of the interest prescribed by the aforesaid Statutes, was paid upon the terms and in the manner prescribed by said Statutes.

3. Alternatively, upon the hypotheses stated in paragraph 5 of part "A", *supra*, the allegations of paragraphs 6, 7 and 9(a), (c) and (d) thereof are hereby repeated and the Trustees, "Objections to Proof of Claim No. 37" filed February 27, 1941 are hereby incorporated herein by reference thereto.

4. No balance is due the State under Claim No. 37.

Shelton Pitney, Walter P. Gardner, Trustees of The Central Railroad Company of New Jersey.
Shelton Pitney, of Counsel.

[fol. 115] —In United States District Court

Reply of State of New Jersey to "Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey."

The reply of the State of New Jersey to the "Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey for unpaid taxes levied by the State of New Jersey," upon the property and franchises of the Debtor, and the several subsidiaries and affiliated companies whose properties and franchises are in the possession of, and are operated by, said Trustees as part of the Debtor's railroad in New Jersey, and for statutory interest accrued thereon, respectfully shows:

A. As to Claim No. 38 for $19,849,790.21

(The Central Railroad Company of New Jersey)

1. The Company against which the taxes in question were levied is a railroad corporation organized and existing under and by virtue of the Laws of the State of New Jersey; its property and francise in New Jersey were taxable for the support of the government of said State and the municipal subdivisions thereof in which said property is located, under the provisions of an act of the Legislature of said State entitled, "An Act to revise and amend 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," approved March 27, 1888 (N. J. P. L. 1888, ch. CCVIII, p. 269), and the various amendments and supplements thereof, subsequently incorporated in Chapters 19 to 29, inclusive, of Title 54 of the Revised Statutes; said property and franchise were duly and lawfully assessed for taxes, in accordance with the Constitution and Laws of [fol. 116] New Jersey, for each of the years of 1932 to 1939, inclusive, and the taxes in question were duly and lawfully levied thereon for those years in the amounts shown upon Schedule "A" attached hereto and made a part hereof. All such taxes are subject to the provision that if the taxes of any railroad company or any portion of such taxes shall remain unpaid on December 1st, following the levying thereof, the company shall be considered to be in default and such taxes or the unpaid portion thereof shall thence-

forth bear interest at the rate of one per cent each month until paid notwithstanding the prosecution of a writ of certiorari or other remedy. A substantial portion of the taxes for each of the above-mentioned years remains unpaid, and, with accrued interest, constitutes the tax debt of the company. Payments were made from time to time by the Railroad Company, as shown upon the said Schedule "A", upon the said tax debt.

2. All of the above-mentioned acts provide that taxes so levied shall be liens paramount to all other liens upon the lands tangible property and franchise of the company against which they are levied, effective on the 1st day of June of the calendar year in which said taxes are payable (R. S. 54:27-4); that if any portion of such taxes shall remain unpaid on the 1st day of December following the levying thereof, such company shall be considered in default, and such taxes, or the unpaid portion thereof, shall thenceforth bear interest at the rate of one per cent for each month until paid (Id.). Under said acts the said liens cover the entire tax debt of the Company.

3. On October 30, 1939, the date when the present proceedings were instituted, it was provided by R. S. 54:28-1 et seq. that, if a tax levied and assessed under the provisions of Chapters 19 to 29 of Title 54 of the Revised Stat- [fol. 117] utes should remain unpaid in whole or in part for ten days after the expiration of the time limited for the payment thereof, the Attorney-General should apply forthwith to a Justice of the Supreme Court for an order that the tax, together with the interest due thereon and a reasonable sum to be certified by the Justice to be paid for the expense of the proceeding, should be made a record of the Supreme Court; that judgment should be entered therefor in the name of the State as plaintiff against the company and the mortgagee or other creditor as defendants, and thereafter that execution of said judgment by the sale of the property of the company should take place, as more particularly specified by said statute.

4. When the present proceedings were instituted, the Bankruptcy Court took jurisdiction of the property and franchise of the Debtor subject to the lien of the State for the tax debt of the Debtor. The Legislature having provided specifically and exclusively the method by which the

said tax debt lien might be enforced or otherwise litigated, when the Honorable Frank J. Murray, the Comptroller of the State, did, on December 10, 1940, file, upon a form prepared and presented under the direction of the Trustees, a proof of claim for taxes and interest due and owing to the State of New Jersey, such claim must be deemed to have been presented . . r the purpose only of protecting the interest of the State in and to any funds or other assets of the Debtor upon which the State had no lien and which might be available for distribution to unsecured creditors who are given certain priorities under Section 64 of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 104) in the event that the lands, tangible property and franchise, upon which the State has a statutory lien, might be insufficient to pay in full the tax debt of the Debtor to the State of New Jersey. The said proof of claim notified the Trustees and the Bank-
[fol. 118] ruptcy Court of the State's tax debt lien and the provisions of law with reference thereto.

5. Neither the Comptroller of the State of New Jersey nor any other officer of the State government has been authorized by law to waive the State's immunity from suit or to submit the rights of the State under its tax debt liens to an adjudication or enforcement by a federal court or by any other court except in the manner specifically provided in paragraph three above. Neither the Comptroller nor any other officer of the State government has been authorized to make the State a claimant in these proceedings with respect to any amount which the State may be able to realize by virtue of a sale to enforce its said lien upon the lands, tangible property and franchise of the Debtor in the State of New Jersey.

6. The Bankruptcy Court has not had jurisdiction of, and does not now have jurisdiction of the property rights of the State in and to the property and franchise of the Debtor as represented by its said liens for taxes and interest. The Honorable Homer C. Zink, presently Comptroller of the State and its Commissioner of Taxation and Finance, disavows any intention of submitting to the Bankruptcy Court jurisdiction over any property right and interest which the State may have arising out of its tax debt lien in and upon the property and franchise of the Debtor which was vested at the time of the institution of these proceedings. The said

Comptroller further shows that he is wholly without authority to submit the property rights represented by the State's tax debt liens to the jurisdiction of the Bankruptcy Court and that such lien claims, if not paid, must be satisfied by the sale of the security afforded by the said lands, tangible property and franchise in the manner provided by law. By filing this reply to the "Supplemental and Amended [fol. 119] Objections and Defenses of Debtor's Trustees, etc." the said Comptroller asserts only an interest in those assets of the Debtor, if any, upon which the State has no lien interest and which may be distributed to unsecured creditors under Section 64 of the Bankruptcy Act or otherwise. Such claim is intended to be operative only in the event that the above-mentioned security is insufficient to satisfy the whole of the tax debt, including taxes and interest, and only in the amount that the tax debt due to the State may exceed such amount as may be realized by a sale of the security under the provision of the statute.

7. The said Comptroller is not presently in a position even to approximate the amount of the claim which the State may have to make, if any, against the unsecured assets of the Debtor under the said Section 64 of the Bankruptcy Act or otherwise, because the Attorney-General, who alone is authorized to enforce the State's tax debt liens, is presently enjoined by order of the Bankruptcy Court from performing his statutory duty in said regard.

8. The said Comptroller asserts that the proof of claim, reply to Trustees' objections, and this present reply to the said supplemental and amended objections, are for the purpose of notifying the Trustees that there is a lien interest of the State of New Jersey which is beyond the jurisdiction of the Court, since the Trustees took the property subject to all tax debt liens of the State, and which no officer of the State is authorized to bring within such jurisdiction, and for the further purpose of laying the basis for making a specific claim for any amount by which any sale of the property subject to the State's liens shall be deficient in satisfying the full tax debt, at such later date as the Court may permit such a sale under the New Jersey statute.

[fol. 120] 9. By way of information to the Trustees and to the Court, and subject to what has been stated hereinabove

as to the nature of this and the prior Claim No. 38, it is respectfully shown as follows:

Crediting the payments aforesaid, as shown in Schedule "A" hereof, first to interest then accrued, and the excess, if any, to principal taxes for each year for which such payments were made, there result balances of principal and interest, as of September 1, 1944, for each year from 1932 to 1939, inclusive, as follows:

Year	Tax	Interest	Total Tax Debt
1932	$2,228,774.18	$2,157,914.03	$4,386,688.21
1933	2,220,889.44	2,444,435.37	4,665,324.81
1934	1,813,404.60	1,864,139.64	3,677,544.24
1935	1,762,784.78	1,616,715.17	3,379,499.95
1936	1,646,434.71	1,526,835.79	3,173,270.50
1937	1,438,694.32	1,161,512.50	2,600,206.82
1938	1,508,844.94	1,040,632.35	2,549,477.29
*1939	1,521,060.56	813,988.65	2,335,049.21
Totals	$14,140,887.53	$12,626,173.50	$26,767,061.03

* Includes additional taxes assessed by State Board of Tax Appeals Judgment of May 26, 1942, together with additional interest from date of certification thereof, August 27, 1942.

Additional interest will become due on the principal sums shown until payment.

Nothing hereinabove contained shall be taken as a waiver of the tax debt of the Company for the year 1940, or of the liability of the Trustees to the State for tax debts accrued since the commencement of these bankruptcy proceedings, as administration expenses.

10. In the alternative to the qualified statement of claim contained in paragraphs one to nine herein, and in the event that it shall be finally determined judicially that the Bankruptcy Court has jurisdiction to adjudicate the amount of [fol. 121] tax debt liens of the State notwithstanding the failure of the State to consent thereto, the State herewith asserts its statutory lien in the full amount of the tax debts as shown in paragraph nine hereinabove, including the additional interest, as stated therein.

Particularly replying to the specific allegations contained in paragraphs one to ten, inclusive, of the Trustees' "Sup-

plemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey":

11. The allegations contained in paragraphs one to five, inclusive, are denied.

12. Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942 were in violation of Article I, paragraph 20 of the Constitution of New Jersey, and were null and void from their enactment. They conferred no rights, privileges, immunities or equities upon the Debtor and the Trustees as against the State of New Jersey.

13. Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942 were in violation of Article IV, Section 7, paragraph 11 of the Constitution of New Jersey, and were null and void from the respective dates of their enactment.

14. Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942 have been finally decreed to be in contravention of Article I, paragraph 20 of the Constitution of New Jersey and null and void by the Court of Chancery of New Jersey and such decree has been affirmed by the Court of Errors and Appeals of New Jersey. Such adjudications by State courts as to the nullity of a State statute under the Constitution of the State are of binding force in [fol. 122] courts of the United States and may not be attacked, set aside, impeached, or qualified in collateral proceedings in courts of the United States.

15. Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942 purported to create settlement machinery under which railroad taxpayers, including the Trustees herein might make certain tenders and the State Treasurer of New Jersey was authorized, required and directed to take specific affirmative actions to consummate the tenders and complete the accord between the taxpayer and the State. Such consummation and completed accord never has taken place, the said State Treasurer having declined to accept the various documents and payments tendered, or to collect or deposit into the Treasury of the State of New Jersey any moneys or checks tendered, all in obedience to orders of restraint entered in the New Jersey Court of Chancery, and to a final decree entered in that Court, sub-

sequently affirmed by the Court of Errors and Appeals, adjudicating said acts to be null and void. The Trustees herein cannot, by collateral action in a court of the United States, compel the effectuation of an accord by the State of New Jersey which, in fact, has not taken place, and which, under the final decree of New Jersey courts of competent jurisdiction, can never lawfully take place.

16. The Debtor and the Trustees failed to comply with the conditions of Chapter 241 of the Laws of 1942 in that the acceptance document filed by and on behalf of the Debtor and the Trustees does not provide for the payment in full of the principal amount of all of its unpaid taxes for the tax years 1932-1940, inclusive, but, on the contrary, for a lesser amount or amounts. The deficiency in the amount agreed to be paid by said acceptance document arises by virtue of (a) erroneous computation by the Trustees and [fol. 123] the Debtor of the amounts of principal taxes due, on the basis of allocating prior partial payments to principal and not to interest, whereas, as a matter of law said payments were allocable first to interest; (b) failure to include in the said principal sum for the tax year 1939 the amount of increase in 1939 taxes payable by the Debtor by virtue of a judgment of the State Board of Tax Appeals dated May 26, 1942.

17. The allegations contained in paragraph six are denied except that it is admitted that other than Class II railroad property was taxed at an "average tax rate," as provided by law and that Class II railroad property was taxed at local tax rates. The legal objections to the "average tax rate," as set forth in said paragraph six, were determined adversely to the Debtor by the Supreme Court of New Jersey in *Central Railroad Company of New Jersey* vs. *State Board of Tax Appeals*, 109 N. J. L. 395, and by the Court of Errors and Appeals of New Jersey in *Central Railroad Company of New Jersey* vs. *State Tax Department*, 112 N. J. L. 5, and said objections are therefore res adjudicata.

18. Paragraph seven is denied.

19. Paragraph eight is denied except that it is admitted that the State received the sum of $239,749.80 as payment on account of franchise taxes due from the Debtor to the State for the tax year 1941 under the Railroad Tax Law of 1941, as amended by Chapter 169 of the Laws of 1942.

20. Paragraphs nine and ten are denied.

21. Further answering paragraphs nine and ten, the State has a statutory lien upon the lands, tangible property and franchise of the Debtor within the State of New [fol. 124] Jersey, but the question of liens cannot be determined or adjudicated by the Bankruptcy Court because the State has not consented to any such adjudication.

22. Further answering paragraphs five to ten, inclusive, each of the assessments made by the assessing authorities of New Jersey for the years 1932-1939, inclusive, upon property of the Debtor, have been litigated by the Debtor in tribunals of appropriate jurisdiction and all of such litigations have resulted in affirmance of the assessments except that upon appeal by the City of Jersey City to the State Board of Tax Appeals the assessed valuation of property of the Debtor for the year 1939 was increased. All objections by the Debtor in law or in fact to any of the said assessments are thus res adjudicata, and the full amount of statutory interest at the rate of one per cent per month is due upon all arrearages in taxes assessed. The litigation aforementioned was as follows:

(a) *1932 taxes (State Board of Tax Appeals).* A petition of appeal by the Debtor was dismissed by the State Board of Tax Appeals and the assessment affirmed, after hearing. No opinion was filed by the Board but the grounds of decision are stated in the opinion of the Board disposing of the appeal for the year 1933. See New Jersey Tax Reports, 1912-1934, at p. 680. No application for review of this judgment by certiorari was made by Debtor.

(b) *1933 taxes.* A petition of appeal filed by Debtor was heard by the State Board of Tax Appeals and the assessments were affirmed. New Jersey Tax Reports, 1912-1934, p. 675. On certiorari the New Jersey Supreme Court, on December 11, 1934, affirmed the judgment of the Board, specifically finding that the method of assessment was legal and did not result in excessive valuations; and that the Board correctly found that the proofs adduced by the rail- [fol. 125] roads did not sustain the allegations of discriminatory assessment. The opinion is reported in 114 N. J. L. 69. No appeal was taken from this judgment.

(c) *1932-1933 federal cases.* The Debtor and other railroad companies brought suit in the United States District Court of New Jersey for a permanent injunction against the collection by the New Jersey authorities of taxes assessed for the years 1932 and 1933. By stipulation the case was argued on the testimony taken before the State Board in the 1933 case. The contentions of the railroads were that their properties were excessively valued by the use of improper principles which resulted in the denial of due process and which subjected interstate commerce to an undue burden, and that they were discriminated against in that their properties were assessed at full value while other property in the State was assessed at less than full value, resulting in denial of equal protection of the laws. The District Court dismissed the application for both procedural and meritorious reasons. The Court held the evidence adduced did not establish the charges made. The opinion is reported in 19 Fed. Supp. 63, decided December 14, 1936.

On appeal the judgment was affirmed by the United States Circuit Court of Appeals for the Third Circuit. The opinion is reported in 100 Fed. (2d) 139, decided November 15, 1938. The Circuit Court held: (1) The contentions made were not established by the proof adduced; (2) the federal Court had no jurisdiction to interfere with the collection of these taxes, under the Federal Judicial Code, Sec. 263; (3) the issues raised on the merits were res adjudicata by reason of their determination by the New Jersey Supreme Court in the 1933 case reported in 114 N. J. L. 69. Application for certiorari was denied by the United States Supreme Court on April 19, 1939. (306 U. S. 651, rehearing denied 306 U. S. 669.)

[fol. 126] (d) *1934 taxes.* The Debtor and other railroad companies appealed from assessments of railroad property for the year 1934, made by the State Tax Commissioner, to the State Board of Tax Appeals, urging: (1) The properties were assessed in excess of their true value; (2) the method of valuing was erroneous and improper; (3) discriminatory assessment of railroad property.

Proof was adduced by the petitioners with respect to all three issues. The petitioners produced 54 witnesses as to underassessment of non-railroad property, and presented 53 exhibits containing appraisals of 20,000 parcels of real

estate made in 104 of the 563 taxing districts in the State. The Board found that the great mass of property in the State was not undervalued and that there was not any general, systematic, or intentional undervaluation of property generally, or any discrimination in assessing railroad property. The assessments were affirmed. The opinion is reported in New Jersey Tax Reports, 1934-1939, page 82, decided on July 23, 1935. No review of this judgment was sought in the New Jersey Supreme Court by any of the petitioning railroads.

(e) *1935 taxes.* Petitions of appeal were filed by the Debtor and other railroad companies with the State Board of Tax Appeals from the assessments of railroad property for the year 1935. The issues raised were identical with those in the 1934 case. The assessments were affirmed by the Board on the authority of the Supreme Court judgment in the 1933 tax case, 114 N. J. L. 69. The opinion of the Board is reported in New Jersey Tax Reports, 1934-1939, page 233, decided on May 5, 1936. No review of this judgment was sought in the New Jersey Supreme Court by any of the petitioning railroads.

(f) *1936 taxes.* Appeals were filed by the Debtor and other railroad companies from assessments for the year [fol. 127] 1936 made by the State Tax Commissioner, upon the same grounds as those urged in the 1934 and 1935 appeals. Hearings were held and testimony was adduced by the railroads upon all the issues presented. The appeals were dismissed by the Board and the assessments were affirmed. No written opinion was rendered. No review of this judgment was sought in the New Jersey Supreme Court by any of the petitioning railroads.

(g) *1934, 1935 and 1936 federal cases.* Suits were brought in the United States District Court of New Jersey by the Debtor and other railroad companies to enjoin the collection of railroad taxes for the years 1934 to 1936, inclusive, by the New Jersey authorities. The railroad companies contended: (1) Railroad lands were valued individually, according to the market value of adjacent lands not used for railroad purposes; (2) railroad structures were individually valued on the basis of cost of reproduction less depreciation; (3) railroad equipment was valued at reproduction cost less depreciation; (4) the franchise valua-

tion was an estimate based on no definite figures; (5) earnings of the railroads were not reflected in the valuations; (6) taxes were not computed upon true values of the property; (7) the valuations were excessive, discriminatory, and violative of the due process and equal protection clauses of the Federal Constitution; (8) the assessments imposed an undue burden upon interstate commerce; (9) the railroads were not valued as such, or as New Jersey divisions of systems to which they belong, and no attempt was made to value with reference to earnings of systems or to the value of the stocks and bonds of the railroads.

Extensive proofs were adduced, occupying a period of several months. The assessments for the years 1934 to 1936, inclusive, were tried as a unit. The District Court sustained all the contentions made by the railroads, except [fol. 128] the charge of discriminatory assessment, which it found not to be established by the evidence. The court enjoined the collection by the New Jersey authorities of more than 60% of the 1934, 1935 and 1936 assessments until a revaluation of the properties should be made by such authorities in conformity with the opinion of the court. The opinion of the court is reported in 30 Fed. Supp. 41, decided November 1, 1939. On January 20, 1940, the injunction was modified to 70%.

Upon appeal, the judgment of the District Court was reversed by the United States Third Circuit Court of Appeals. The opinion is reported in 115 Fed. (2d) 968, decided November 27, 1940. The Circuit Court held that the evidence did not establish the deprivation of any rights of the railroads under the United States Constitution, and that all questions as to the validity of the method of assessment of railroad property in New Jersey were res adjudicata by virtue of the judgments of the New Jersey Supreme Court in respect thereto, in the appeals of the 1933 assessments, reported 114 N. J. L. 69. Certiorari was denied by the United States Supreme Court on April 28, 1941. (313 U. S. 568.)

(h) *1937-1938 taxes (State Board of Tax Appeals).* Appeals were filed for the years 1937 and 1938 by the Debtor and other railroad companies from the assessments made by the State Tax Commissioner. The petition of appeal of the Debtor alleged the following: (1) The assessments were

in excess of true value; (2) errors in method of valuation as charged in prior appeals; (3) assessments were arbitrary and grossly excessive, constituting a deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution; (4) petitioners' property was assessed in excess of true value, while other than railroad property generally was intentionally [fol. 129] and system-ically assessed at less than true value, thus constituting a denial of equal protection of the laws in violation of Article IV, Section 7, paragraph 12, of the New Jersey Constitution; (5) petitioners' assessments were intentionally and systematically made at a different and higher percentage of true value than those of other than railroad property generally throughout the State, thus constituting denial of equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution; (6) the taxes were excessive, unlawful, and unconstitutional, because based upon excessive assessments; the average tax rate, applied to main stem (Class I), tangible personal property (Class III), and franchise (Class IV), was in excess of a lawful rate and higher than if other than railroad property generally throughout the State, was assessed at true value, resulting in illegal discrimination and denial of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution; (7) to the extent that they were in excess of true value, the assessments constituted an interference with and a burden upon interstate commerce in violation of Article I, Section 8, of the Federal Constitution.

The appeals for the years 1937 and 1938 were tried as a unit. Hearings were held by the Board and an aggregate of 4,610 pages of testimony were taken and 450 exhibits introduced into evidence. No testimony was adduced as to discriminatory assessment of railroad property as compared with nonrailroad property. The Board affirmed the assessments on May 13, 1941. The opinion is reported in 19 N. J. Misc. 427, 20 Atl. (2d) 330. No review of the judgment of the Board in these cases was sought.

(i) *1939 taxes (State Board of Tax Appeals).* Appeals were taken by the Debtor and other railroad companies from assessments made by the State Tax Commissioner to [fol. 130] the State Board of Tax Appeals. For the year

1939, the State Tax Commissioner made primary valuations substantially as in 1938. On petition for revision however, the Commissioner made final valuations as follows: he assessed main stem or Class I lands at the same valuations as for the year 1938, except for waterfront property. All waterfront land valuations, including the great bulk of Class II railroad property in Hudson County, were reduced uniformly 10% from the primary valuations. All improvements, or structural items, on Class II railroad property, were reduced uniformly 7½% from the primary valuations. All construction items, including grading on the main stem, were reduced uniformly 20% from the primary valuations. The City of Jersey City filed appeals to the State Board of Tax Appeals, seeking to restore the reductions in assessments of Class II property in that taxing district.

Testimony was introduced at length on behalf of the railroads, except as to discriminatory assessment of railroad property, as to which there was no testimony adduced. Testimony was adduced by the State in rebuttal of the proofs of the railroads, by the City of Jersey City in support of its appeal, and by the railroads in opposition to said appeal. The Board, on May 26, 1942, rendered judgment on the appeal of the City of Jersey City, restoring the primary valuations fixed for the year 1939. The opinion of the Board is reported in 20 N. J. Misc. 283, 26 Atl. (2d) 733.

The appeals of the railroad companies were dismissed, without opinion, by judgments dated June 2, 1942. No review of said judgment was sought in the State Courts by the Debtor or the Trustees. By Order No. 171 the Bankruptcy Court reversed and set aside the said judgment of May 26, 1942, as to the Debtor and Trustees. On appeal by the State and the City of Jersey City, the said Order No. 171 was reversed and set aside by the United States Circuit Court of Appeals for the Third Circuit. 136 F. (2d) 633 (C. C. A. 3d 1943).

[fol. 131] 23. There is repeated herewith all of the allegations contained in the "Reply of Claimant, State of New Jersey, to Trustees' Objections to Tax Claims," filed March 26, 1941, insofar as such allegations are not inconsistent with anything contained herein.

B. As to Claim No. 34 for $10,369.88

(Ogden Mine Railroad Company)

1. There is repeated each and every allegation contained in paragraphs one to eight, inclusive, of "A" hereinabove.

2. By way of information to the Trustees and to the Court, and subject to what has been stated hereinabove as to the nature of this and the prior Claim No. 34, it is respectfully shown as follows:

Crediting the payments aforesaid, as shown in Schedule "A" hereof, first to interest then accrued, and the excess, if any, to principal taxes for each tax year for which such payments were made, there result balances of principal and interest, as of September 1, 1944, for each year from 1933 to 1939, inclusive, as follows:

Year	*Tax*	*Interest*	*Total Tax Debt*
1933	$3,279.83	$ 903.96	$4,183.79
1934	2,649.71	2,729.07	5,378.78
1935	643.53	591.58	1,235.11
1936	631.96	587.53	1,219.49
1937	583.22	472.23	1,055.45
1938	623.26	429.86	1,053.12
1939	579.10	315.22	894.32
Totals	$8,990.61	$6,029.45	$15,020.06

Additional interest will become due on the principal sums shown until payment.

[fol. 132] Nothing hereinabove contained shall be taken as a waiver of the tax debt of the Company for the year 1940, or of the liability of the Trustees to the State for tax debts accrued since the commencement of these bankruptcy proceedings, as administration expenses.

3. In the alternative to the qualified Statement of Claim contained in paragraphs one and two herein, and in the event that it shall be finally determined judicially that the Bankruptcy Court has jurisdiction to adjudicate the amount of tax debt liens of the State notwithstanding the failure of the State to consent thereto, the State herewith makes

claim for such liens in full amount of the sums shown in paragraph two hereinabove, with interest as stated.

Particularly replying to the specific allegations contained in paragraphs one to four, inclusive, of the "Trustees' Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey":

4. The allegations contained in paragraphs one to four, inclusive, are denied except as to such admitted portions of paragraph- six and seven of part A of Supplemental and Amended Objections which are incorporated by reference.

5. There is repeated herewith each of the allegations contained in paragraphs twelve to twenty-three of "A" hereinabove.

C. As to Claim No. 35 for $458,800.35

(New York and Long Branch Railroad Company)

1. There is repeated each and every allegation contained in paragraphs one to eight, inclusive, of "A" hereinabove.

[fol. 133] 2. By way of information to the Trustees and to the Court, and subject to what has been stated hereinabove as to the nature of this and the prior Claim No. 35, it is respectfully shown as follows:

Crediting the payments aforesaid, as shown in Schedule "A" hereof, first to interest then accrued, and the excess, if any, to principal taxes for each tax year for which such payments were made, there result balances of principal and interest, as of September 1, 1944, for each year from 1934 to 1939, inclusive, as follows:

Year	*Tax*	*Interest*	*Total Tax Debt*
1934	$52,453.87	$61,354.66	$113,808.53
1935	51,240.26	53,786.29	105,026.55
1936	52,504.31	48,812.63	101,316.94
1937	85,470.19	69,204.20	154,674.39
1938	45,727.08	31,537.42	77,264.50
1939	33,200.19	17,972.30	51,172.49
Totals	$320,595.90	$282,667.50	$603,263.40

Additional interest will become due on the principal sums shown until payment.

Nothing hereinabove contained shall be taken as a waiver of the tax debt of the Company for the year 1940, or of the liability of the Trustees to the State for tax debts accrued since the commencement of these bankruptcy proceedings, as administration expenses.

3. In the alternative to the qualified Statement of Claim contained in paragraphs one and two herein, and in the event that it shall be finally determined judicially that the Bankruptcy Court has jurisdiction to adjudicate the amount of tax debt liens of the State notwithstanding the failure of the State to consent thereto, the State herewith makes claim for such liens in full amount of the sums shown in paragraph two hereinabove, with interest as stated.

[fol. 134] Particularly replying to the specific allegations contained in paragraphs one to four, inclusive, of the "Trustees' Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey":

4. The allegations contained in paragraphs one to four, inclusive, are denied except as to such admitted portions of paragraphs six and seven of part A of Supplemental and Amended Objections which are incorporated by reference.

5. There is repeated herewith each of the allegations contained in paragraphs twelve to twenty-three of "A" hereinabove.

D. As to Claim No. 36 for $22,939.09

(Dover and Rockaway Railroad Company)

1. There is repeated each and every allegation contained in paragraphs one to eight, inclusive, of "A" hereinabove.

2. By way of information to the Trustees and to the Court, and subject to what has been stated hereinabove as to the nature of this and the prior Claim No. 36, it is respectfully shown as follows:

Crediting the payments aforesaid, as shown in Schedule "A" hereof, first to interest then accrued, and the excess, if any, to principal taxes for each tax year for which such payments were made, there result balances of principal and

interest, as of September 1, 1944, for each year from 1933 to 1939, inclusive, as follows:

[fol. 135]

Year	*Tax*	*Interest*	*Total Tax Debt*
1933	$4,375.99	$1,201.32	$5,577.31
1934	3,010.65	3,100.81	6,111.46
1935	3,033.57	2,788.52	5,822.09
1936	2,380.73	2,213.33	4,594.06
1937	2,224.54	1,801.18	4,025.72
1938	2,025.96	1,397.29	3,423.25
1939	1,894.65	1,031.32	2,925.97
Totals	$18,946.09	$13,533.77	$32,479.86

Additional interest will become due on the principal sums shown until payment.

Nothing hereinabove contained shall be taken as a waiver of the tax debt of the Company for the year 1940, or of the liability of the Trustees to the State for tax debts accrued since the commencement of these bankruptcy proceedings, as administration expenses.

3. In the alternative to the qualified Statement of Claim contained in paragraphs one and two herein, and in the event that it shall be finally determined judicially that the Bankruptcy Court has jurisdiction to adjudicate the amount of tax debt liens of the State notwithstanding the failure of the State to consent thereto, the State herewith makes claim for such liens in full amount of the sums shown in paragraph two hereinabove, with interest as stated.

Particulary replying to the specific allegations contained in paragraphs one to four, inclusive, of the "Trustees' Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey":

4. The allegations contained in paragraphs one to four, inclusive, are denied except as to such admitted portions of paragraphs six and seven of Supplemental and Amended Objections which are incorporated by reference.

[fol. 136] 5. There is repeated herewith each of the allegations contained in paragraphs twelve to twenty-three of "A" hereinabove.

E. As to Claim No. 37 for $9,129.90

(Bay Shore Connecting Railroad Company)

1. Substantial payments have been made against this account by the Lehigh Valley Railroad Company. The exact relationship of the companies is not known.

2. There is repeated each and every allegation contained in paragraphs two to eight, inclusive, of "A" hereinabove.

3. By way of information to the Trustees and to the Court, and subject to what has been stated hereinabove as to the nature of this and the prior Claim No. 37, it is respectfully shown as follows:

Crediting the payments heretofore made first to interest then accrued, and the excess, if any, to principal taxes for each tax year for which such payments were made, there result balances of principal and interest, as of September 1, 1944, for each year from 1933 to 1939, inclusive, as follows:

Year	*Tax*	*Interest*	*Total Tax Debt*
1933	$946.23	$515.05	$1,461.28
1934	1,295.77	279.25	1,575.02
1935	1,109.63	108.10	1,217.73
1936	1,002.92	15.85	1,018.77
1937	762.91	12.05	774.96
1938	775.98	12.26	788.24
1939	581.37	9.19	590.56
Totals	$6,474.81	$951.75	$7,426.56

Additional interest will become due on the principal sums shown until payment.

[fol. 137] Nothing hereinabove contained shall be taken as a waiver of the tax debt of the Company for the year 1940, or of the liability of the Trustees to the State for tax debts accrued since the commencement of these bankruptcy proceedings, as administration expenses.

4. In the alternative to the qualified Statement of Claim contained in the paragraphs herein, and in the event that it shall be finally determined judicially that the Bankruptcy Court has jurisdiction to adjudicate the amount of tax debt liens of the State notwithstanding the failure of the

State to consent thereto, the State herewith makes claim for such liens in full amount of the sums shown in paragraph three hereinabove, with interest as stated.

Particularly replying to the specific allegations contained in paragraphs one to ten, inclusive of the "Trustees' Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey":

5. The allegations contained in paragraphs one to four, inclusive, are denied except as to such admitted portions of paragraphs six and seven of Supplemental and Amended Objections which are incorporated by reference.

6. There is repeated herewith each of the allegations contained in paragraphs twelve to twenty-three of "A" hereinabove.

Respectfully, (Signed) Walter D. Van Riper, Attorney-General of the State of New Jersey, Attorney for the State of New Jersey, State House, Trenton, N. J.

Dated: December 12, 1944.

[fol. 138]

SCHEDULE A—SHEET 1

CENTRAL RAILROAD OF NEW JERSEY SYSTEM
CENTRAL RAILROAD OF NEW JERSEY

Date of Levy	First Class			Second Class		
	Amount of Levy	Date of Payment	Amount of Payment	Amount of Levy	Date of Payment	Amount of Payment
1932	$2,372,866.16	12- 1-32	$720,000.00	$1,775,908.02	12- 1-32	$1,200,000.00
		3-12-37	154,387.09		9-30-38	3,779.77
		7- 3-40	108,553.59		7-30-40	41,446.41
		8- 2-40	108,553.58		8- 2-40	41,446.42
		9- 4-40	108,553.59		9- 4-40	41,446.41
		10- 3-40	108,553.59		10- 3-40	41,446.41
		11- 7-40	108,553.59		11- 7-40	41,446.41
		12- 2-40	75,975.07			
1933	2,145,190.95	12- 1-33	901,975.72	1,683,486.25	12- 1-33	705,812.04
		3-12-37	170,619.76		3-12-37	135,931.08
		12- 2-40	41,601.03		9-30-38	5,760.96
					12- 2-40	32,423.90
1934	2,126,613.77	12- 1-34	1,137,787.28	1,773,373.98	12- 1-34	948,795.87
		1-28-37	138,180.98		1-28-37	115,228.52
					9-30-38	3,586.32
1935	1,987,943.48	12- 1-35	1,073,489.48	1,844,197.34	12- 1-35	995,866.56
		1-28-37	119,276.61		1-28-37	110,651.84
					9-30-38	3,730.54
1936	1,959,791.36	12- 1-36	1,097,483.16	1,782,105.70	12- 1-36	997,979.19
					9-30-38	4,082.44
1937	1,874,577.67	12- 1-37	1,124,746.61	1,722,258.28	12- 1-37	1,033,395.02
					9-30-38	3,595.94
1938	1,932,529.53	12- 1-38	1,159,517.71	1,849,582.20	9-30-38	9,999.39
					12- 2-38	1,103,749.69
1939	1,706,740.27	12-27-39	1,024,044.16	*1,835,224.18	12-27-39	1,025,509.07

* Includes additional taxes assessed by State Board of Tax Appeals by judgment of May 26, 1942.

[fol. 139]

SCHEDULE A—SHEET 2

CENTRAL RAILROAD OF NEW JERSEY SYSTEM
OGDEN MINE RAILROAD CO.

Date of Levy	First Class			Second Class		
	Amount of Levy	Date of Payment	Amount of Payment	Amount of Levy	Date of Payment	Amount of Payment
1933	$5,240.50	12- 1-33	$2,196.62	$577.87	12- 1-33	$342.02
		3-12-37	370.60			
		2-19-40	2,673.38		2-19-40	235.85
1934	5,144.23	12- 1-34	2,752.28	554.36	12- 1-34	296.60
		1-28-37	334.26		1-28-37	36.01
1935	1,126.75	12- 1-35	608.45	272.25	12- 1-35	147.02
		1-28-37	67.60		1-28-37	16.33
1936	1,170.73	12- 1-36	655.61	265.55	12- 1-36	148.71
1937	1,190.18	12- 1-37	714.10	267.86	12- 1-37	160.72
1938	1,278.42	12- 1-38	767.05	279.73	12- 1-38	167.84
1939	1,119.82	2-19-40	665.89	248.20	2-19-40	148.92

[fol. 140]

SCHEDULE A—SHEET 3

CENTRAL RAILROAD OF NEW JERSEY SYSTEM
NEW YORK AND LONG BRANCH RAILROAD CO.

Date of Levy	First Class			Second Class		
	Amount of Levy	Date of Payment	Amount of Payment	Amount of Levy	Date of Payment	Amount of Payment
1934	$166,722.86	12- 1-34	$125,042.15	$43,092.62	12- 1-34	$32,319.46
1935	161,653.31	12- 1-35	121,239.98	43,307.73	12- 1-35	32,480.80
1936	166,633.27	12- 1-36	124,974.95	43,383.96	12- 1-36	32,537.97
1937	169,450.77	12- 1-37	101,670.46	44,224.71	12- 1-37	26,534.83
1938	147,010.00	12- 1-38	110,257.50	35,898.31	12- 1-38	26,923.73
1939	120,037.44	12- 1-39	60,018.72	34,509.92	12- 1-39	17,254.96
		2-28-40	36,011.14		2-28-40	10,352.95

[fol. 141]

SCHEDULE A—SHEET 4

CENTRAL RAILROAD OF NEW JERSEY SYSTEM
DOVER AND ROCKAWAY RAILROAD CO.

Date of Levy	First Class			Second Class		
	Amount of Levy	Date of Payment	Amount of Payment	Amount of Levy	Date of Payment	Amount of Payment
1933	$5,724.48	12- 1-33	$2,399.71	$1,506.27	12- 1-33	$455.05
		3-12-37	462.52		3-12-37	298.09
		2-19-40	2,862.25		2-19-40	753.13
1934	5,529.85	12- 1-34	2,958.60	944.99	12- 1-34	505.59
		1-28-37	359.31		1-28-37	61.40
1935	5,570.26	12- 1-35	3,007.94	1,024.45	12- 1-35	553.20
		1-28-37	334.22		1-28-37	61.47
1936	4,651.73	12- 1-36	2,604.97	759.03	12- 1-36	425.06
1937	4,729.02	12- 1-37	2,837.41	832.33	12- 1-37	499.40
1938	4,369.97	12- 1-38	2,621.98	694.93	12- 1-38	416.96
1939	3,827.90	2-19-40	2,296.74	615.16	2-19-40	369.10

[fol. 142] STATE OF NEW JERSEY,
County of Mercer, ss:

Homer C. Zink, of full age, being duly sworn according to law on his oath says:

1. I am Comptroller of the Treasury of the State of New Jersey and Commissioner of Taxation and Finance of the State of New Jersey.

2. I have read the foregoing "Reply of State of New Jersey to 'Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey'" and the facts set forth therein are true to the best of my knowledge, information and belief.

3. The said "Reply of State of New Jersey to 'Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey'" truly sets forth the position I officially take as said Comptroller of the Treasury of New Jersey and Commissioner of Taxation and Finance of the State of New Jersey with respect to the tax debt of the Central Railroad Company of New Jersey to the State of New Jersey.

(Signed) Homer C. Zink.

Sworn and subscribed before me this 12th day of December, A. D. 1944. (Signed) C. Lillain Ayres, Notary Public of New Jersey.

[fol. 143] IN UNITED STATES DISTRICT COURT

OBJECTIONS OF INSTITUTIONAL GROUP AND THE TRUSTEE OF THE DEBTOR'S GENERAL MORTGAGE TO CLAIM NO. 38 FILED BY THE STATE OF NEW JERSEY

Now come the Institutional Group of Investors, Holders of Central Railroad Company of New Jersey Securities, and Central Hanover Bank and Trust Company, as trustee under the Debtor's General Mortgage, dated July 1, 1887, both jointly and separately, expressly reserving their rights to amend these objections, and upon information and belief

object to claim No. 38, filed herein by the State of New Jersey, on the following grounds:

1. The amount of said claim exceeds the maximum amount that the State may lawfully claim under the provisions of its statutes comprising Chapter 290 of the New Jersey Laws of 1941 and Chapter 241 of the New Jersey Laws of 1942, with which the Trustees of the Debtor have duly complied pursuant to orders of this Court.

(a) Pursuant to the provisions of said statutes, the maximum amount that the State may lawfully claim is payable only in the amounts, at the times, upon the terms and in the manner therein prescribed.

(b) The maximum amount that the State may so claim for the years 1932-1940 inclusive, is $13,438,669.19, of which the Trustees have paid $2,432,352.91 on account, leaving a balance of $11,006,316.28 to be paid as provided in said statutes.

2. Alternatively, if said statutes are finally determined to be without force and effect with respect to the trustees and the Debtor's Estate, objection is made to the allowance of any part of said claim with respect to any period subsequent to 1933, on the ground that said claim is based upon [fol. 144] the application to the Debtor's property, of tax rates which were derived from computations based upon undervaluation of other taxable property and failure to value still other taxable property, which undervaluations and omissions were in violation of the constitution and statutes of the State of New Jersey and resulted in the application of unlawful and excessive tax rates to the Debtor's property. No adequate remedy in the courts of the State of New Jersey was or is available and consequently, the effect of the use and application of said unlawful assessments and tax rates would be, unless relief were granted by this Court, to deprive these Objectors of their property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. (A) Said claim, in so far as it includes amounts in addition to the principal amount of the taxes alleged to be

unpaid, is not entitled to a lien equal or paramount to the lien of the Debtor's General Mortgage, for the reasons that

(i) the law of the State of New Jersey at the time of execution and delivery of the Debtor's General Mortgage made no provision for such a lien.

(ii) the law of the State of New Jersey at the time these proceedings were instituted made no provision for such a lien, and

(iii) The law of the State of New Jersey now makes no provision for such a lien,

and the imposition of such a lien, even if now authorized by the law of the State of New Jersey, would result in the impairment of contract rights of the Trustee of the Debtor's General Mortgage and in depriving these Objectors of their [fol. 145] property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

(B) The State has no lien, with respect to said claim, on the personal property of the Debtor or of the Debtor's Trustees.

4. (A) In so far as said claim includes amounts in addition to the principal amount of the taxes alleged to be unpaid, any such additional amounts that accrued while the Debtor or its Trustees were in good faith contesting the legality of the taxes included in said claim or while the collection of said taxes was enjoined by judicial decree or statute, constitute a penalty under Section 57 (j) of the Bankruptcy Act and may not be allowed.

(B) Alternatively, if any such additional amounts referred to in the preceding paragraph (A) shall be found to be allowable, objection is made to the allowance of any portion thereof with respect to the period subsequent to October 30, 1939, in excess of six per cent per annum on the principal amount of the taxes allowed, and with respect to the period subsequent to December 1, 1940, in excess of

[fol. 146] three per cent per annum on the principal amount of the taxes allowed.

Dated: November 22, 1944.

Group of Institutional Investors, Holders of Central Railroad Company of New Jersey Securities, by: (Signed: Fred N. Oliver) Fred N. Oliver; (Signed: Willard P. Scott) Willard P. Scott; (Signed: Blair Reiley) Blair Reiley, Their Attorneys. Central Hanover Bank and Trust Company, as Trustee, by: (Signed: A. M. Lewis) A. M. Lewis; (Signed: Autenreith & Wortendyke) Autenreith & Wortendyke, Its Attorneys.

Oliver & Donnally, Rathbone, Perry, Kelley & Drye, of Counsel.

[fol. 147] IN UNITED STATES DISTRICT COURT

REPLY OF STATE OF NEW JERSEY TO "OBJECTIONS OF INSTITUTIONAL GROUP AND THE TRUSTEE OF THE DEBTOR'S GENERAL MORTGAGE TO CLAIM NO. 38 FILED BY THE STATE OF NEW JERSEY

The reply of the State of New Jersey to the "Objections of Institutional Group and the Trustee of the Debtor's General Mortgage to Claim No. 38 Filed by the State of New Jersey", respectfully shows:

1. As to the allegations contained in paragraph one, it repeats each and every allegation contained in paragraphs twelve to sixteen, inclusive, of the "Reply of State of New Jersey to 'Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey'."

2. As to the allegations of fact contained in paragraphs two to four, inclusive, the facts are denied and the conclusions of law contained therein are controverted as a matter of law.

3. By way of further reply, each and every allegation contained in paragraphs one to ten, inclusive, and in paragraphs seventeen to twenty-three, inclusive, of the "Reply of State of New Jersey to 'Supplemental and Amended Ob-

jections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey','' are repeated insofar as they concern statements of fact or law contained in the ''Objections of Institutional Group and the Trustee of the Debtor's General Mortgage to Claim No. 38 Filed by the State of New Jersey'' similar or identical to those contained in ''Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New [fol. 148] Jersey'', to which said paragraphs in the said reply of the State of New Jersey are directed.

Respectfully, Walter D. Van Riper, Attorney-General of the State of New Jersey, Attorney for the State of New Jersey.

Dated: December 28, 1944.

On Order No. 250 re-referring to Special Master the disputed tax claims of the State of New Jersey, all existing or additional objections thereto and the State's reply to said objections and also referring the State's motion to dismiss the Trustees' petition, dated August 12, 1944, for an adjudication of said claims.

IN UNITED STATES DISTRICT COURT

INTERIM REPORT OF SPECIAL MASTER

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

Augustus C. Studer, Jr., Special Master, hereby reports to this Court as follows:

By order No. 250, heretofore made herein under date of October 16, 1944, all tax claims filed by the State of New Jersey, the Trustees' objections thereto and the State's reply to said objections and, also, the purported special appearance of the State of New Jersey objecting to the jurisdiction of this Court, which special appearance was [fol. 149] filed herein on August 28, 1944, were referred to the undersigned Special Master for hearing and report thereon.

Pursuant to that order, the matter came on to be heard before the Master on Tuesday, December 19, 1944, in the presence of the following:

Shelton Pitney, Esquire and Walter P. Gardner, Esquire, Trustees of the Debtor;

Benjamin C. Van Tine, Esquire, Deputy Attorney General of the State of New Jersey and Milton B. Conford, Esquire, of Counsel;

Willard P. Scott, Esquire and Blair Reiley, Esquire, for Institutional Bondholders;

White and Staples, Esquires and Edwin M. Slote, Esquire, of Counsel, by Robert Carey, Esquire and Edwin M. Slote, Esquire, for the Watters Committee; and

Reynier J. Wortendyke, Jr., Esquire, for the Central Hanover Bank and Trust Company, Trustee of the Debtor's Mortgage.

It was agreed by counsel that the question of the Court's jurisdiction to hear and report on the tax claims of the State of New Jersey would be heard first and an interim report filed by the Master on that question. (See Transcript, p. 68.)

This report deals only with the question of the jurisdiction of this Court to hear and determine, without the consent of the State of New Jersey, the tax claims filed by the State of New Jersey herein.

Considered in this report and submitted with it are:

(1) The petition, dated August 12, 1944, of Shelton Pitney and Walter P. Gardner, Trustees of the properties of the Debtor herein, for adjudication concerning New Jersey State tax claims heretofore filed herein;

[fol. 150] (2) Special appearance filed herein under date of August 28, 1944, of Walter D. Van Riper, Attorney General of the State of New Jersey, for the sole purpose of objecting to the jurisdiction of the Court to entertain petition for adjudication concerning New Jersey State tax claims and for Order No. 250;

(3) Proofs of claims Nos. 34, 35, 36, 37 and 38, filed by the State of New Jersey herein;

(4) Objections to proofs of claims Nos. 34, 35, 36, 37 and 38, filed by the Debtor and its Trustees;

(5) Reply of claimant, State of New Jersey, to Trustees' objections to tax claims;

(6) Supplemental and amended objections and defenses of Debtor's Trustees to the claim filed by the State of New Jersey;

(7) Reply of State of New Jersey to Supplemental and amended objections and defenses of Debtor's Trustees to claims filed by the State of New Jersey;

(8) Objections of Watters Committee, dated December 18, 1944, in support of Trustees' opposition to Claim No. 38 for $19,849,790.21, for alleged taxes and interest, filed on December 10, 1940, by the State of New Jersey in these proceedings:

(9) Reply of State of New Jersey, dated December 29, 1944, to objections of Watters Committee in support of Trustees' opposition to Claim No. 38 for $19,849,790.21, for alleged taxes and interest, filed on December 10, 1940, by the State of New Jersey in these proceedings;

(10) The brief filed herein on behalf of Walter D. Van Riper, Attorney General of New Jersey, appearing specially;

[fol. 151] (11) Trustees' brief, filed herein in opposition to motion to dismiss the petition of the Trustees;

(12) Memorandum of Institutional Group and the Trustees of the Debtor's general mortgage in opposition to motion of Walter D. Van Riper, Attorney General of the State of New Jersey, to dismiss Trustees' petition for adjudication regarding New Jersey State Tax Claims;

(13) Reply of State of New Jersey, dated December 29, 1944, to objections of Institutional Group and the Trustee of the Debtor's general mortgage to Claim No. 38 filed by the State of New Jersey;

(14) The transcripts of the testimony taken at the hearings before the Master on November 8, 1944 and December 19, 1944;

(15) The exhibits offered at the hearing before the Master on December 19, 1944.

The Trustees of the Debtor filed objections and supplemental and amended objections and defenses to the claims filed by the State of New Jersey herein and also filed their petition for adjudication concerning the New Jersey State tax claims hereinabove referred to, in which, among other things, they prayed (Petition, p. 24) that this Court adjudicate "to what extent, if at all, the proofs

of claim of the State of New Jersey should be allowed." Other prayers are contained in that petition, but the prayer last above quoted is the only one substantially involved in this report, because at the hearing before the Master the question was presented and argued by counsel on that basis.

The State of New Jersey, by its Attorney General, specially appearing, contends that is was not the intention of Congress, by Section 77 of the Bankruptcy Act, to confer upon this Court power "to make an adjudication that [fol. 152] will be binding upon the sovereign State of New Jersey concerning the amount of the tax debt that is due and payable to the State, which is a paramount lien upon the properties of the debtor within its boundaries, or an adjudication in anywise concerning or affecting such liens" (Brief, p. 1); also, that if the act be so construed, it is unconstitutional, as violating the State's sovereign immunity from suit under the Eleventh Amendment to the Constitution (Brief, p. 16); also, that Section 64 (a) of the Bankruptcy Act does not confer such power upon this Court in this proceeding, because the claims of the State herein are secured by liens (Brief, p. 20).

The constitutional immunity of the State of New Jersey from a suit in a federal Court, without its consent, is admitted as a general proposition.

On behalf of the State, both in the brief filed by the Attorney General, and in the argument made at the hearing, it was vigorously contended that the Comptroller of the State of New Jersey, in verifying the proofs of claims in these proceedings, which were filed in the name of the State of New Jersey as claimant, by so doing, did not and could not waive any immunity from suit which the State of New Jersey had.

The Trustees maintain that they are defending the debtor's estate against the State's claims; that the State is the claimant and actor; that there is a fund in Court—an estate in custodia legis—in which the State claims an interest and against which it asserts its claims (Trustees' brief, p. 2). They maintain further that they resist, but seek no recovery from the State and assert no right, title or interest in and to any property of the State; they say their petition herein reveals certain of their defenses to the State's proofs of claim, including defenses which have

arisen since their original objections were filed and that [fol. 153] it supplements the defenses stated in those objections (Trustees' brief, p. 2).

From the testimony taken at the hearing before the Master and the exhibits then marked in evidence, the Master makes the following findings of fact:

(1) The State's proofs of claim in these proceedings, numbered 34, 35, 36, 37 and 38, were filed in the name of the State of New Jersey as Claimant. They were signed and verified by Frank J. Murray, "Comptroller of the Treasury of New Jersey." They designated David T. Wilentz, Attorney General, State House, Trenton, New Jersey, as "Attorney Authorized to Represent Claimant" and on their backs the following appears: "Claim of State of New Jersey, David T. Wilentz, Attorney for Claimant, Address: State House, Trenton, N. J." In the body of each of those claims, Paragraph (4) says:

> "(4) Security or lien, if any, for said claim: Answered in (10) below."

Also, in the body of each of those claims, Paragraph 10 says:

> "(10) Lien, priority or preferential classification, if any, claimed for the claim, or any part thereof, the reasons therefor and full statement of the facts respecting same:
>
> "The statute of New Jersey provides that these taxes shall be a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this State (Section 9, Chapter 208, P. L. 1888, as amended and supplemented; Section 54:27-4, Revised Statutes). The lien shall take effect on June 1 of the year in which the tax is payable."

[fol. 154] (2) The Trustees filed objections in these proceedings to proofs of claim Nos. 34, 35, 36, 37 and 38.

(3) The State of New Jersey filed in these proceedings Reply of Claimant, State of New Jersey, to Trustees' objections to tax claims (Nos. 34, 35, 36, 37 and 38). That reply was signed "David T. Wilentz, Attorney General, Attorney for Claimant, State of New Jersey, State House, Trenton, New Jersey;"

(4) A petition was filed by the State of New Jersey in the Erie Railroad reorganization proceedings then pending in the District Court of the United States for the Northern District of Ohio, Eastern Division, for leave to file its claim against the Trustees for the unpaid balance of taxes and assessments for the years 1939 and 1940, inclusive. That petition was signed "David T. Wilentz, Attorney General, State House, Trenton, New Jersey. Spieth, Taggert, Spring & Annat, By Paul H. Keough, of Counsel, 1568 Union Commerce Building, Cleveland, Ohio. Attorneys for Claimant, State of New Jersey" (Exhibit T-8, December 19, 1944);

(5) Order No. 404, filed February 28, 1942, was made by R. N. Wilkin, District Judge, in the said reorganization proceedings of the Erie Railroad authorizing the State of New Jersey to file its claim for 1939 and 1940 taxes (Exhibit T-9, December 19, 1944);

(6) In the said reorganization proceedings of the Erie Railroad Company a proof of claim was filed in which the State of New Jersey was the claimant. That claim was signed and verified by Frank J. Murray, "Comptroller of the Treasury" and it designated David T. Wilentz, Attorney General, State House, Trenton, New Jersey. as "Attorney Authorized to Represent Claimant." In the body of the claim, Paragraph (4) says:

> [fol. 155] "(4) Security of lien, if any, for said claim: Statutory paramount lien on property for 1933 to 1937, inclusive, taxes; such lien on 1938 taxes attaches on November 1, 1938."

Also, in the body of the claim, Paragraph (10) says:

> "(10) Priority or preferential classification, if any, claimed for the claim, or any part thereof, the reasons therefor and full statement of the facts respecting same: Established by statute as a lien paramount to all other liens upon the lands, tangible property and franchises of Debtor from and after November 1, of the year for which the taxes for each year are assessed, respectively."

(Exhibit T-10, December 19, 1944);

(7) An answer to proof of claim No. D-17 of the State of New Jersey was filed by the Trustees of the property of Erie Railroad Company in the said reorganization proceedings of that company (Exhibit T-11, December 19, 1944);

(8) A reply was filed in the said Erie reorganization proceedings to the answer and objections of the Trustees to the proof of claim filed therein by the State of New Jersey for unpaid taxes levied by the State of New Jersey upon the property and franchise of Erie Railroad Company, Debtor. That reply was signed "David T. Wilentz, Attorney General, Attorney for Claimant, State of New Jersey, State House, Trenton, New Jersey" (Exhibit T-12, December 19, 1944);

(9) A supplemental answer to proof of claim No. D-17 of State of New Jersey was filed by the Trustees of the property of the Erie Railroad Company in the said Erie [fol. 156] reorganization proceedings (Exhibit T-13, December 19, 1944);

(10) A reply to the supplemental answer filed by the Trustees in the said Erie reorganization proceedings to proof of claim No. D-17 of the State of New Jersey, and theretofore filed therein, was also filed in the said Erie reorganization proceedings. That reply was signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, by Paul H. Keough, of Counsel, 1568 Union Commerce Building, Cleveland, Ohio. Attorneys for Claimant, State of New Jersey" (Exhibit T-14, December 19, 1944);

(11) A proof of claim for taxes for the years 1939 and 1940 against Erie Railroad Company, Debtor, was filed in the said reorganization proce-dings of that company. That claim was signed:

> "State of New Jersey Name of Claimant by Homer C. Zink, Comptroller of the Treasury."

It was verified by Homer C. Zink, who swore that he was "the Comptroller of the Treasury of claimant herein." In the body of the claim Paragraph (4) says:

> "(4) Security or lien, if any, for said claim: The State of New Jersey has a statutory paramount lien

on the property of this debtor as to the 1939 tax. This lien took effect June 1, 1939, and as to the 1940 tax, this lien took effect on June 1, 1940."

Also, in the body of the claim Paragraph (8) says:

"(8) Priority or preferential classification, if any, claimed for the claim, or any part thereof, the reasons [fol. 157] therefor and full statement of the facts respecting same: Claim for these taxes is by statute a lien paramount to all other liens upon the lands, tangible property and franchises of debtor, from and after June 1 of the years 1939 and 1940, respectively."

(Exhibit T-15, December 19, 1944);

(12) Answers to proof of claim supplemental D-17 of State of New Jersey were filed in the said Erie reorganization proceedings by H. A. Taylor, Vice-President and General Counsel and Robert E. Woodruff and John A. Haddon, Trustees of the Property of Erie Railroad Company, by H. A. Taylor, Counsel for Trustees, respectively (Exhibits T-16 and T-17, December 19, 1944);

(13) A reply was filed by the State of New Jersey as claimant in the said Erie reorganization proceedings to the answer of Erie Railroad Company to proof of claim supplemental to No. D-17. This reply was signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, by Paul H. Keough, Attorneys for Claimant, State of New Jersey (Exhibit T-18, December 19, 1944);

(14) A further reply to the answer of the Trustees to proof of claim supplemental No. D-17 was filed in the said Erie reorganization proceedings by the State of New Jersey. It was signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, by Paul H. Keough, Attorneys for Claimant, State of New Jersey" (Exhibit T-19, December 19, 1944);

(15) A second supplemental answer to proof of claim No. D-17 of State of New Jersey was filed by the Trustees in the said Erie reorganization proceedings (Exhibit T-20, December 19, 1944);

[fol. 158] (16) A reply was filed by the State of New Jersey in the said Erie reorganization proceedings to the

second supplemental answer filed herein by the Trustees and signed "David T. Wilentz, Attorney General of the State of New Jersey and Spieth, Taggert, Spring & Annat, by Paul H. Keough, Attorneys for Claimant, State of New Jersey" (Exhibit T-21, December 19, 1944);

(17) An amendment was filed by the State of New Jersey as claimant in the said Erie reorganization proceedings to the reply theretofore filed therein to the Trustees' answer. This amended reply was signed "David T. Wilentz, Attorney General, Attorney for Claimant, State of New Jersey, State House, Trenton, New Jersey" (Exhibit T-22, December 19, 1944);

(18) In the reorganization proceedings in this Court of Northern Railroad Company of New Jersey, Debtor, which were also brought under Section 77, David T. Wilentz, as Attorney General of New Jersey, gave notice under date of October 18, 1939, to Northern Railroad Company of New Jersey and its Trustees that on November 2, 1939, he would apply to Thomas W. Trenchard, one of the Justices of the Supreme Court of the State of New Jersey, for an order that the unpaid part of the tax levied by the State Tax Commissioner against the Northern Railroad Company of New Jersey for the year 1933, pursuant to statutes referred to in that notice, be made a matter of record of that Court and judgment entered thereon. That notice is attached to and made a part of Exhibit W-2, December 19, 1944;

(19) Based upon the petition of the Trustees of Northern Railroad Company of New Jersey (Exhibit W-2, December 19, 1944) this Court made an order dated November 1, 1939, enjoining David T. Wilentz, Attorney General of the State of New Jersey, from taking any proceedings [fol. 159] under or pursuant to the notice (last above referred to) theretofore served upon those Trustees by the said David T. Wilentz, Attorney General (Exhibit W-3, December 19, 1944);

(20) In the same proceedings the Attorney General of the State of New Jersey advised the Trustees of the Northern Railroad Company of New Jersey that he had no objection to the allowance of the injunction prayed for by them (Exhibit W-6, December 19, 1944) and the restraint against him was continued (Exhibit W-7, December 19, 1944);

(21) In the reorganization proceedings in this Court of the Susquehanna Railroad Company, a proof of claim was filed against the railroad for taxes due the State of New Jersey. In filing that proof of claim in those proceedings, the same course was pursued which was pursued in filing the claims in these proceedings and the claims there filed were in the same form and tenor as the proofs of claims filed in these proceedings. (See stipulation between counsel, Testimony, pp. 63 to 64.)

With reference to the general duties of the State Comptroller, *N. J. R. S. 54:19-10,* provides:

"The state comptroller shall:

"a. Superintend the collection of the revenue;

"b. Take general charge and supervision of all rights, interest and property of the state;

"c. Institute and direct prosecution against delinquent officers of the revenue, and for just claims and debts due to the state;"

With reference to the general duties of the Attorney General of the State of New Jersey, *N. J. R. S. 52:17-2,* provides:

[fol. 160] "The attorney general shall, when not incompatible with his other public duties:

* * * * * * *

"g. Attend generally to all matters in which the state is a party or in which its rights and interests are involved;"

Based upon the course of conduct of the Comptroller and of the Attorney General in the other reorganization proceedings above mentioned, namely, the Erie Railroad Company, the Susquehanna Railroad Company and the Northern Railroad Company of New Jersey, and considering the statutes last above quoted with reference to the duties of those officers, it is the opinion of the Master that in connection with the filing of the claims of the State of New Jersey in these proceedings the Comptroller and the Attorney General acted in pursuance of their statutory duties and that the proofs of claims of the State of New Jersey filed in these proceedings were properly filed.

Section 77 of the Bankruptcy Act (c) provides:

"(7) The Judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan, and its acceptance, after notice and hearing the division of creditors and stockholders into classes according to the nature of their respective claims and interests," etc.

Sub-section (c) of the same Act also provides:

"(13) The judge may on his own motion • • • refer any matters for consideration and report, either [fol. 161] generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals," etc.

The same Act, in discussing a plan of reorganization in sub-section (b), provides, among other things, for "the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens," etc.

Sub-section (b), Paragraph (5) of the same Act provides:

"The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property," etc.

The same sub-section (b), Paragraph (5), also provides:

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Sub-section (a) of the same Act provides that the Court "shall, during the pendency of the proceedings under this

section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

[fol. 162] Sub-section (1) of the same Act provides:

> "(1) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

In the opinion of the Master, the foregoing provisions confer upon this Court jurisdiction over the kinds of claims asserted by the State in this proceeding and such construction of the Act is not unconstitutional as against the State, but is within the power conferred upon the Congress by the Federal Constitution to *etsa*blish uniform laws on the subject of bankruptcies. *Van Huffel* v. *Harkelrode*, 284 U. S., p. 225; *New York* v. *Irving Trust Company, Trustee in Bankruptcy*, 288 U. S., p. 329.

The fact is, and the Attorney General of the State of New Jersey so asserts, that the State of New Jersey has claims for taxes against the Debtor, regardless of the effect of the filing of the formal proofs of claims in these proceedings because of the powers or lack of powers of any officer of the State in connection with the filing of those formal proofs of claims. These claims, he asserts, are secured by liens upon the Debtor's property. In the opinion of the Master, that property is in the custody of the Court by its Trustees, who have been duly appointed pursuant to Section 77 in these proceedings. That being so, by filing their petition, the Trustees are seeking an opportunity in this Court to defend the property of the Debtor, now in the custody of this Court, against alleged improper claims to that property. In the opinion of the Master, by so doing, the Trustees are not [fol. 163] violating the sovereign immunity of the State of New Jersey from suit.

Section 64 (a) of the Bankruptcy Act, dealing with the priority of debts and the order of payment, provides:

> "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court, and Provided Further, That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

Doubt has been cast upon the applicability of the above section to proceedings under Section 77 by the case of *Arkansas Corporation Commission* v. *Thompson*, 313 U. S., p. 132, but subsequent decisions of District Courts and Circuit Courts of Appeals have construed that case as denying jurisdiction to re-determine the amount of tax claims in limited situations, for example, where the valuation of property has been previously determined by a quasi-judicial taxing body. *Lyford* v. *State of New York*, 140 F. (2d) p. 840, 2d Cir.; *in re Monongahela Rye Liquors*, 141 F. (2d) p. 864, 3d Circ.

Both in his brief and on the oral argument, the Attorney General conceded that the Bankruptcy Court has the power as against the State to determine the validity of tax claims of the State, where such claims are unsecured. (Brief, p. 20, citing *New Jersey* v. *Anderson*, 203 U. S., p. 483.) The Attorney General makes a distinction between the effect of [fol. 164] the State's assertion of unsecured claims and the effect of the State's assertion of secured claims. He argues that when asserting an unsecured claim, the State is applying to be paid out of assets *in custodia legis*, but when the claims of the State are secured by liens, the lien interests of the State are not *in custodia legis* and so any proceedings in this Court affecting those liens, such as the Trustees' petition, is a suit against which the State has sovereign immunity.

In the opinion of the Master, the entire property of the railroad is *in custodia legis*, subject, however, to such rights

as are given by law to lienholders. The cases cited by the Attorney General do not hold otherwise. Having custody of the property, the Bankruptcy Court, subject to the limitation expressed in the case of *Arkansas Corporation Commission* v. *Thompson*, 313 U. S., p. 132, *supra*, which limitation is not now involved, is the proper Court to determine the validity and amount of the tax claims of the State of New Jersey and the incidental liens alleged to affect the property in the custody of the Court. *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S., p. 734, at p. 738.

It is the opinion of the Master that the claim of the State to sovereign immunity should be denied and that the petition of the Trustees should not be dismissed.

Respectfully submitted, Augustus C. Studer, Jr., Special Master.

Dated: January 17th, 1945.

[fol. 165] IN UNITED STATES DISTRICT COURT

OBJECTIONS OF STATE OF NEW JERSEY TO INTERIM REPORT OF SPECIAL MASTER

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

Walter D. Van Riper, as Attorney-General of the State of New Jersey, does herewith, pursuant to the notice of William H. Tallyn, Clerk of the Court, dated January 19, 1945, make the following objections to the Interim Report of Augustus C. Studer, Jr., Special Master, dated January 17, 1945, and filed on said date.

1. The Special Master erred in recommending that the petition of the Trustees of August 12, 1944, should not be dismissed.

2. The Special Master erred in failing to recommend that the motion of Walter D. Van Riper, Attorney-General of the State of New Jersey, appearing specially, to dismiss the said petition for the reasons stated in said motion and special appearance and on the argument, be granted.

3. The Special Master erred in concluding "that the claim of the State to sovereign immunity should be denied."

4. The statement in the said report on page 2, thereof, as follows,

> "It was agreed by counsel that the question of the Court's jurisdiction to hear and report on the tax claims of the State of New Jersey would be heard first . . .",

is erroneous in fact in that the question of jurisdiction raised by the Attorney-General concerned the jurisdiction of the Court to hear any part of the petition of the Trustees [fol. 166] dated August 12, 1944, or to adjudicate with respect to any of the prayers contained therein as against the State of New Jersey, without the consent of the State.

5. The Special Master erred in limiting his report, as he states he has done on page 2 thereof, to "the question of the jurisdiction of this Court to hear and determine, without the consent of the State of New Jersey, the tax claims filed by the State of New Jersey herein," since the objection and motion of the Attorney-General was to the jurisdiction of the Court to hear any part of the petition of the Trustees, dated August 12, 1944, or to adjudicate with respect to any of the prayers therein contained as against the State of New Jersey, without the consent of the State.

6. The statement in said report on page 4 thereof, as follows,

> "The Trustees of the Debtor filed objections and supplemental and amended objections and defenses to the claims filed by the State of New Jersey herein and also filed their petition for adjudication concerning the New Jersey State tax claims hereinabove referred to, in which, among other things, they prayed (Petition, p. 24) that this Court adjudicate 'to what extent, if at all, the proofs of claim of the State of New Jersey should be allowed.' Other prayers are contained in that petition, but the prayer last above quoted is the only one substantially involved in this report, because at the hearing before the Master the question was presented and argued by counsel on that basis,"

is erroneous in that the question presented at the hearing before the Master was not limited to the jurisdiction of the [fol. 167] Court to adjudicate "to what extent, if at all, the

proofs of claim of the State of New Jersey should be allowed," but extended to the jurisdiction of the Court to adjudicate any of the matters raised in any of the prayers of the petition of the Trustees of August 12, 1944.

The said statement is further erroneous in that there is no prayer in said petition as described in said quoted excerpt from the report of the Special Master. The prayer referred to by the Special Master is actually one for a determination as to whether, if any contract made by the petitioners with State of New Jersey is "not binding on the parties thereto including petitioners, to what extent, if at all, the proofs of claim of the State of New Jersey should be allowed."

7. The statement beginning in the last paragraph on page 4 of said report as to the contention of the State of New Jersey with respect to Section 77 of the Bankruptcy Act, quoting the brief of the Attorney-General, at page 1 thereof, in asserted substantiation of the restatement of said contention, is erroneous. There is no reference at page 1 of said brief to Section 77 of the Bankruptcy Act, as represented in the said report of the Special Master, and the position of the State with respect to jurisdiction, as is specifically stated in the second sentence on page 1 of said brief of the Attorney-General, is that there is no jurisdiction in this Court to entertain the said Trustees' petition "against the State of New Jersey, without its consent." The Attorney-General did not and does not take any position that jurisdiction in this Court is lacking, under Section 77 of the Bankruptcy Act, in any case where the State does consent to be made a party and thereby submits to the exercise of jurisdiction over it.

8. The reference in said report to the position of the Attorney-General with respect to the Eleventh Amend-
[fol. 168] ment to the Constitution, at page 5 of said report, referring to the said brief at page 16 of said brief, is erroneous in that there is no specific reference at page 16 of the brief to the Eleventh Amendment and further in that the position of the Attorney-General with respect to immunity under the Eleventh Amendment is based upon the premise that the State shall not have consented to the exercise of such jurisdiction.

9. The statement at page 5 of said report, referring to the brief of the Attorney-General at page 20 of said brief,

and purportedly representing the Attorney-General's position with respect to Section 64a of the Bankruptcy Act, is erroneous in that the position of the Attorney-General is not only that Section 64a of the Bankruptcy Act does not confer jurisdiction upon this Court over the claims of the State because they are secured by liens, but also that said Section cannot constitutionally grant any jurisdiction to this Court "to render an adjudication binding against a State, without its consent, of the taxes due and owing to it" (page 18 of said brief).

10. The Special Master erroneously admitted in evidence, over objection by the Attorney-General, the documents listed as items (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (20), and (21), set forth at pages 6, 7, 8, 9, 10, 11 and 12 of his said report, for the reason that none of said documents are material relevant or competent upon the issue of jurisdiction in this case.

11. The Special Master erred in relying upon the evidence referred to in the paragraph next hereinabove, for his conclusions stated in the first paragraph on page 13 of said report, because of the incompetence of said evidence. [fol. 169] 12. At page 13 of his said report, the Special Master states the following:

> "Based upon the course of conduct of the Comptroller and of the Attorney-General in the other reorganization proceedings above mentioned, namely, the Erie Railroad Company, the Susquehanna Railroad Company and the Northern Railroad Company of New Jersey, and considering the statutes last above quoted with reference to the duties of those officers, it is the opinion of the Master that in connection with the filing of the claims of the State of New Jersey in these proceedings the Comptroller and the Attorney-General acted in pursuance of their statutory duties and that the proofs of claims of the State of New Jersey filed in these proceedings were properly filed."

If, as appears from the context of the said report as a whole, the Special Master was intending by the foregoing language to make a finding that in filing the proofs

of claim the Comptroller or the Attorney-General were intending to submit the tax debt liens of the State of New Jersey for enforcement or adjudication to the Bankruptcy Court or that the statutes of New Jersey authorize such action by said officers, the same is erroneous in fact and in law and is not supported either by the evidence referred to in paragraph 10 hereinabove as having been erroneously admitted in evidence, or by the statutes of the State of New Jersey.

The several items of evidence referred to in paragraph 10 hereinabove, and which the Special Master refers to as the "course of conduct of the Comptroller and of the Attorney-General," were offered in evidence by the Trustees and Intervenors as purportedly establishing a practical contemporaneous construction of the said statutes contrary to the position taken by the Attorney-General here with [fol. 170] respect to the significance and effect of the filing of the proofs of claim in the present reorganization proceedings. Said evidence was incompetent for said purpose because (1) there is no ambiguity in said statutes which is properly susceptible of resolution by any showing of practical contemporaneous construction, and (2) said former actions of the Attorney-General and the Comptroller do not represent the taking of any position by the State of New Jersey inconsistent with the position which the State now takes with respect to the significance of the filing by the Comptroller of the proofs of claim in the present reorganization proceedings and (3) there is no showing of a course of practical construction sufficiently uniform and long continued to satisfy the rule with respect to contemporaneous practical construction of statutes.

13. The conclusion of law made by the Special Master in his said report at page 15 thereof, as follows,

> "In the opinion of the Master, the foregoing provisions confer upon this Court jurisdiction over the kinds of claims asserted by the State in this proceeding and such construction of the Act is not unconstitutional as against the State, but is within the power confered upon the Congress by the Federal Constitution to establish uniform laws on the subject of bankruptcies"

is improper for the following reasons:

(a) It is not responsive to the position taken by the Attorney-General in moving to dismiss the petition of the Trustees.

(b) The State does not "assert" any claims "in this proceeding" in the sense of submitting its tax debt liens for enforcement or adjudication, or to any judicial action [fol. 171] under the supposed authority of the Bankruptcy Act. The filing of the proofs of claim was a mere notification to the Trustees, the Debtor and to the Court of the existence and amount of such liens.

(c) The statement in the said conclusion of law of the Special Master that the said provisions of the Bankruptcy Act grant this Court jurisdiction to adjudicate concerning tax liens of the State of New Jersey and that said act is not unconstitutional in said respect, "but is within the power conferred upon the Congress by the Federal Constitution to establish uniform laws on the subject of bankruptcies," is not responsive to the position and contention of the Attorney-General that, assuming the existence of general statutory jurisdiction over the subject matter of liens upon property of the Debtor, it is necessary for the Bankruptcy Court also to secure jurisdiction over the person of the lienor in order to make adjudications concerning liens, and that such jurisdiction cannot be obtained over the person of a sovereign State without its consent because that would be tantamount to a suit against such State without its consent.

14. The conclusions of law of the Special Master in his said report at page 15, as follows,

> "The fact is, and the Attorney-General of the State of New Jersey so asserts, that the State of New Jersey has claims for taxes against the Debtor, regardless of the effect of the filing of the formal proofs of claims in these proceedings because of the powers or lack of powers of any officer of the State in connection with the filing of those formal proofs of claims. These claims, he asserts, are secured by liens upon the Debtor's property. In the opinion of the Master, that property is in the custody of the Court, by its [fol. 172] Trustees, who have been duly appointed

pursuant to Section 77 in these proceedings. That being so, by filing their petition, the Trustees are seeking an opportunity in this Court to defend the property of the Debtor, now in the custody of this Court, against alleged improper claims to that property. In the opinion of the Master, by so doing, the Trustees are not violating the sovereign immunity of the State of New Jersey from suit"

are erroneous in that:

(a) The specific conclusion that "the Debtor's property" "is in the custody of the Court" is erroneous if it is intended thereby to imply that all property rights in and to said property, including the interest represented by the lien of the State of New Jersey for tax debts owing to it, are in the custody of the Court. Such interest of the State of New Jersey was a perfected lien at the institution of the reorganization proceedings and did not come within the custody or jurisdiction of the Court upon the institution of such proceedings and could not thereafter come within such custody or jurisdiction unless the State was made a party to said proceedings. The State was never made a party and cannot be made a party without its consent.

(b) The specific conclusion of the Special Master that the Trustees, "by filing their petition," are defending the property of the Debtor against alleged improper claims to that property, is erroneous in that the State has not yet and is not now asserting its said liens for enforcement in these proceedings.

(c) The Master erred in determining in the foregoing excerpt of his report that the Trustees in so doing "are not violating the sovereign immunity of the State of New Jersey from suit."

[fol. 173] 15. The Special Master erred in his said report, at page 16 thereof, in finding that,

"Both in his brief and on the oral argument, the Attorney-General conceded that the Bankruptcy Court has the power as against the State to determine the validity of tax claims of the State, where such claims are unsecured. (Brief, p. 20, citing *New*

Jersey vs. *Anderson*, 203 U. S., p. 483.) The Attorney-General makes a distinction between the effect of the State's assertion of unsecured claims and the effect of the State's assertion of secured claims. He argues that when asserting an unsecured claim, the State is applying to be paid out of assets in custodia legis, but when the claims of the State are secured by liens, the lien interests of the State are not in custodia legis and so any proceedings in this Court affecting those liens, such as the Trustees' petition, is a suit against which the State has sovereign immunity,"

for the following reasons:

(a) The Attorney-General did not and does not concede that the Bankruptcy Court has the power to determine the validity or tax claims of a state, without its consent, where such claims are unsecured. The distinction which the Attorney-General made between secured claims and unsecured claims of a state against a bankrupt is that the assertion by a state of an unsecured claim must be regarded as an affirmative prosecution of its demand in the bankruptcy proceedings, and therefore as a submission to the jurisdiction of the Court as a party claimant, since the State would otherwise be powerless to share in the general assets of the bankrupt. Where the claim of the state is secured, on the other hand, the claimant may be regarded as standing on [fol. 174] its lien, outside the jurisdiction of the Court, unless it is made a party in proceedings to adjudicate or otherwise affect said lien. A sovereign state cannot thus be made a party without its consent.

(b) The Special Master in the foregoing excerpt erroneously states that the Attorney-General makes a distinction "between the effect of the State's assertion of unsecured claims and the effect of the State's assertion of secured claims." The Attorney-General has made no such distinction between the effect of "assertions" in reorganization proceedings, if the word "assertion" is intended to imply a demand to be enforced against the Debtor's estate in such proceedings.

16. The conclusion of law of the Special Master in his said report, at page 16, that the Bankruptcy Court "is the proper court to determine the validity and amount of the

tax claims of the State of New Jersey and the incidental liens alleged to affect the property in the custody of the Court" is erroneous in that the Bankruptcy Court cannot properly make any adjudication concerning the tax claims or liens of the State of New Jersey unless the State voluntarily becomes, or is lawfully made a party to said proceedings. In the present case the State has not voluntarily submitted its lien claims for enforcement or adjudication in the Bankruptcy Court nor has it lawfully been made a party. Nor can it be made a party to said proceedings without its consent with respect to such liens.

Respectfully submitted, Walter D. Van Riper, As Attorney-General of New Jersey.

Dated January 27, 1945.

[fol. 175] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

OPINION

Confirming Special Master's Report

APPEARANCES:

Shelton Pitney, Esq., Walter P. Gardner, Esq., Trustees.
Benjamin C. Van Tine, Esq., for the State of New Jersey.
Edwin M. Slote, Esq., Attorney for Watters Committee.
Blair Reilly, Esq., Attorney for Inst. Group of Bondholders.

FAKE, District Judge:

The issue here arises in a railroad reorganization proceeding under Section 77 of the Bankruptcy Act.

The State of New Jersey through its Comptroller filed certain proofs of claim with the trustees herein for unpaid taxes due the State.

An Order of Reference was made by me directing the Special Master, appointed under Section 77 (c) (13) of the Act, to hear and report on the amount and validity of said tax claims.

The Attorney General of the State contended before the Master, and as well here, that this court is without

jurisdiction to hear and adjudicate the tax claims as in said Order of Reference provided.

The Master has forwarded to this court the record made before him on the subject of jurisdiction, together with the briefs filed before him, and has filed his report thereon holding that this court does have jurisdiction and [fol. 176] that the theory of the sovereign immunity of the State does not apply.

The issue is now before me on motion to adopt and confirm the Master's report.

Upon a consideration of the said Master's report and the record returned therewith, together with the substance of the briefs and oral arguments made before me, I am of the opinion that this court has jurisdiction as asserted and that the Master's report should be adopted and confirmed in all things.

An order will be entered herein overruling the objections and confirming the Master's report.

I will hear counsel on the form of the order.

Filed February 21, 1945.

[fol. 177] In United States District Court

Order No. 271 Overruling Objections of State of New Jersey to Interim Report of Special Master Dated January 17, 1945 and Confirming Said Report

This Court by Order No. 66 in this cause dated October 7, 1940 having required the claims of all creditors "including all claims of whatever character" against the Debtor "or its property" to be filed by December 31, 1940 in the form and manner prescribed by said order, and the State of New Jersey having thereupon, within time and in the form prescribed by said order, filed its proofs of claim (Nos. 34-38) for balances of taxes alleged to be due to it from the Debtor and for interest or interest penalties on said balances at the rate of 1% per month; and the Trustees having on March 3, 1941 filed objections to said claims to which the State of New Jersey on March 26, 1941 filed its "reply of claimant, State of New Jersey, to Trustees' objections to tax claims"; and this Court by Order No. 93 dated April 1, 1941 having referred all disputed claims (in-

cluding the State's claims aforesaid) to the standing Special Master, "together with all objections thereto, for hearing and report thereon"; and the Legislature of the State of New Jersey having thereupon enacted Chapter 290 of the Laws of New Jersey of 1941, effective July 22, 1941, (subsequently amended by Chapter 241 of the Laws of 1942), known as the Railroad Tax Settlement Act, and this Court by Order No. 123 dated August 8, 1941 having authorized and directed the Trustees of the Debtor to comply with said Act and having thereafter by Order No. 135 dated November 24, 1941 adjudged that the Trustees had taken all steps necessary to comply and should continue to comply with said Act and having by Order No. 163 dated June 12, 1942 revoked so much of said Order No. 93 as referred the State's proofs of claim (Nos. 34-38), as aforesaid, to the standing Special Master for hearing and report thereon; and the United States Circuit Court of Appeals for the [fol. 178] Third Circuit having reversed said Order No. 163 in certain other respects, on the appeal of the State of New Jersey, and having remanded the record on said appeal to this Court to await the determination by the Court of Chancery of New Jersey of the constitutionality of said Railroad Tax Settlement Act unless this Court should find that delay which might be harmful to the Debtor and its creditors might result, in which event this Court might proceed itself to hear and decide the constitutional issue; and, following the decisions of the courts of the State of New Jersey in the suit so referred to by the United States Circuit Court of Appeals, this Court having by Order No. 250 dated October 16, 1944 referred and re-referred to the standing Special Master for hearing and report thereon said tax claims filed by the State of New Jersey, all objections thereto and the State's reply to said objections, and also the State's plea of sovereign immunity from suit filed herein on August 28, 1944, in the form of a special appearance; and supplemental, amended and additional objections and defenses to the State's proofs of claim having thereupon been filed by the Trustees, by the Institutional Group of Bondholders and the Trustee of the Debtor's General Mortgage, and by the Bondholders' Committee known as the Watters Committee, and the State of New Jersey having thereupon filed its further replies to such supplemental, amended and additional objections and defenses; and the Master on December 19, 1944 having taken testimony

and heard argument under said Order No. 250 touching the State's plea of sovereign immunity aforesaid and having on January 17, 1945 filed an interim report wherein he concluded, among other things, that the Court has jurisdiction in the premises and that the plea of sovereign immunity should be denied; and the State of New Jersey having thereupon filed objections to said interim report, and said interim report and the State's objections having [fol. 179] thereupon been duly brought on for hearing and argument before this Court on February 7, 1945, on notice to all interested parties; and the Court having heard the arguments of Benjamin C. Van Tine, Esq., Deputy Attorney General, on behalf of the State of New Jersey, in opposition to confirmation of said interim report and in support of the State's said objections thereto, and of Shelton Pitney, Esq., one of the Trustees of the Debtor, Blair Reiley, Esq. and Willard P. Scott, Esq., of counsel with the Institutional Bondholders' Group, and Edwin M. Slote, Esq., of counsel with the Watters Committee, in support of said interim report, and having considered the record herein; and the Court being of opinion that it has jurisdiction to consider and pass upon the proofs of claim filed by the State, all objections thereto filed with the Special Master and the State's replies to said objections; and that the State's plea of sovereign immunity is inapplicable and therefore without merit:

It is, on this 5 day of March, 1945, Ordered that the objections filed by the State of New Jersey to the interim report of the Special Master dated January 17, 1945 be and the same are hereby overruled, that the Special Master's findings and conclusions as set forth in said report be and they are hereby adopted by this Court and that said report be and the same is hereby confirmed.

Guy L. Fake, United States District Judge.

Filed: March 5, 1945.

[fol. 180] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

To The Central Railroad Company of New Jersey, Debtor, and Shelton Pitney and Walter P. Gardner, Trustees of The Central Railroad Company of New Jersey, Debtor, Central Hanover Bank and Trust Company, Trustee of the Debtor's General Mortgage, Institutional Group of Lienors, Brooks Committee of Bondholders, Watters Committee of Bondholders, and to Whom It May Concern:

SIRS:

Notice is hereby given that the State of New Jersey, by Walter D. Van Riper, Attorney General of New Jersey, hereby Appeals to the United States Circuit Court of Appeals for the Third Circuit from the whole of the Order of the Court No. 271, entered in these proceedings on March 5, 1945, which order is entitled "Order No. 271 Overruling Objections of State of New Jersey to Interim Report of Special Master Dated January 17, 1945 and Confirming Said Report".

State of New Jersey, Appellant, By (S.) Walter D. Van Riper, Attorney-General of New Jersey, Attorney for Appellant.

Dated: April 2, 1945.

[fol. 181] STATEMENT OF POINTS

State of New Jersey, Appellant, by Walter D. Van Riper, Attorney General, herewith states the points on which the Appellant intends to rely on the appeal from Order No. 271, entered March 5, 1945, notice of which was filed April 2, 1945, as follows:

1. The Court erred in determining that the bankruptcy court had the power to make adjudications, binding upon the State of New Jersey, concerning statutory liens that were affixed in and to the property of the debtor as of the date of the filing of the petition in bankruptcy without the consent of the said State of New Jersey.

2. The Court erred in holding that the State of New Jersey had consented thereto.

3. The Court erred in failing to hold that the bankruptcy court was without jurisdiction to make adjudications, binding upon the State of New Jersey, concerning the statutory liens of the said State that were affixed at the time of the institution of the bankruptcy proceedings for the reason that no such adjudication may be made without the consent of the State and the State had not consented thereto.

Respectfully, Walter D. Van Riper, Attorney General of the State of New Jersey, Attorney for Appellant.

Dated: April 6, 1945.

[fol. 182] IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION CONCERNING PORTIONS OF RECORD IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY IN THE PROCEEDINGS FOR THE REORGANIZATION OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, NO. 29,778, FOR USE ON HEARING OF NO. 8861 AND NO. 8889

It is hereby stipulated by and between counsel for the parties to the above entitled proceedings that the following statement correctly recites those portions of the record below which are referred to herein and that this stipulation may be used for all purposes before the United States Circuit Court of Appeals for the Third Circuit on the hearing of its No. 8861 and No. 8889.

1. On October 30, 1939 The Central Railroad Company of New Jersey (hereinafter referred to as the "Debtor") filed in the District Court of the United States for the District of New Jersey a petition for reorganization under and by virtue of Section 77 of the Bankruptcy Act (11 U. S. C. A. 205). On the same day said court approved said petition.

2. By Order No. 66, dated October 7, 1940, said District Court (hereinafter referred to as the "bankruptcy court") required the claims of all creditors, "including all claims of whatever character" against the debtor "or its property" to be filed by December 31, 1940 in the form and manner prescribed by said order.

3. On December 11, 1940 there was filed, in the form prescribed by said Order No. 66, a proof of claim for 1932-39

tax balances allegedly owed by the Debtor to the State of New Jersey. Said proof of claim (since known as "Claim No. 38") was signed and verified by the Comptroller of the State of New Jersey and named the Attorney General of [fol. 183] the State of New Jersey as counsel for the claimant.

4. At the same time there were filed proofs of claim for tax balances allegedly due to the State of New Jersey for said years by subsidiaries of or railroads affiliated with the Debtor. Said proofs of claim (since known as Claims Nos. 34, 35, 36 and 37) were also signed and verified by the Comptroller of the State of New Jeresy and named the Attorney General of the State as counsel for the claimant.

5. In said proofs of claim (Nos. 34-38) a statutory lien for the taxes claimed was asserted and the proofs of claim cited R. S. 54:27-4.

6. On March 3, 1941 the Trustees of the Debtor filed objections to said proofs of claim.

7. On March 26, 1941 there was filed the "Reply of Claimant, State of New Jersey, to Trustees' Objections to Tax Claims." This was signed by the Attorney General of the State of New Jersey as "Attorney for Claimant." Said reply prayed:

> "for the dismissal of said objections, and each of them, and for allowance of the full amount of each of said claims and interest as set forth in Schedule 'A' attached thereto, respectively, together with interest on said taxes, respectively, at the rate of 1% per month and after December 1st, 1940."

8. By Order No. 93 dated April 1, 1941 the bankruptcy court referred all disputed claims to the standing Special Master "together with all objections thereto, for hearing and report thereon." The Special Master was therein [fol. 184] directed to "hear, determine and report upon the order and priority of all claims" and "upon all contested matters to take the testimony and hear argument, make findings of fact, adopt conclusions of law and submit the same to the Court as his report, either with or without opinion."

9. Hearings before the Special Master concerning the State's claims (Nos. 34-38) had not commenced when the

Legislature of New Jersey on July 22, 1941 enacted Chapter 290 of the Laws of 1941, subsequently amended by Chapter 241 of the Laws of 1942 (L. 1941, p. 769; L. 1942, p. 652; 58 N. J. S. A. Cum. Pocket Sup. App. 4-7.1 et seq.).

10. By Orders Nos. 123, 135 and 163 the Trustees of the Debtor were directed by the bankruptcy court to accept and comply with said legislation and the above-mentioned order of reference (Order No. 93) was revoked insofar as the State's claims were concerned.

11. Said legislation led to litigation in state courts which continued for approximately three years. *Wilentz* v. *Hendrickson* 133 N. J. Eq. 447, 33 A. (2d) 336, affirmed 135 N. J. Eq. 244, 38 A. (2d) 199. See also *In re Central Railroad Company of New Jersey* 136 F. (2d) 633, 640 (C. C. A. 3rd).

12. Following the conclusion of the litigation in *Wilentz* v. *Hendrickson supra* the bankruptcy court, on petition of the Trustees dated August 12, 1944, made and entered its Order No. 250, dated October 16, 1944, re-referring the State's claims and all objections thereto to the Special Master for hearing and report thereon. Prior to the entry of Order No. 250, at the hearings held on August 28, September 18 and October 16, 1944 upon the petition of the Trustees for the entry of said order the State of New Jer- [fol. 185] sey, by its Attorney General, appeared specially and challenged the jurisdiction of the bankruptcy court to adjudicate the amount and validity of the State's tax lien claims on the ground that the State had not consented to adjudication of its tax lien claims and that any such adjudication would be made in a suit against the State to which the State had not consented and would violate the State's sovereign immunity.

13. Said plea of sovereign immunity from suit was also referred to the Special Master by said Order No. 250.

14. On January 17, 1945 the Special Master filed an interim report wherein he recommended that the bankruptcy court had jurisdiction to determine the amount and validity of the State's tax lien claims and that the plea of sovereign immunity should be overruled.

15. The State of New Jersey by its Attorney General filed objections to the interim report of the Special Master,

argument whereon was duly heard by the bankruptcy court on February 7, 1945.

16. On February 21, 1945 the bankruptcy court filed a memorandum opinion holding that it had jurisdiction and that the interim report of the Special Master should be confirmed.

17. By Order No. 271 dated March 5, 1945 the bankruptcy court confirmed the interim report of the Special Master and overruled the objections filed by the State of New Jersey.

18. Pursuant to leave granted by the Special Master under the authority conferred upon him by said Order No. [fol. 186] 250 supplemental and amended objections and defenses to the claims of the State of New Jersey were filed by the Trustees of the Debtor and by three intervenors in the reorganization proceedings, being groups of or committees representing holders of the Debtor's bonds. On December 12, 1944 the State of New Jersey filed its "Reply of State of New Jersey to Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey" and shortly thereafter filed replies to the objections of said intervenors.

19. At various times during the progress of said reorganization proceedings the Attorney General of the State of New Jersey has entered his appearance on behalf of the State without denominating such appearances as "special." The Attorney General appeared on November 1, 1939 on the return of an order to show cause why proceedings then pending in the New Jersey Supreme Court for the entry of a judgment against the Debtor for state taxes assessed for the years 1932 and 1933 should not be restrained. He appeared at the hearing on November 27, 1939 touching the selection of trustees of the Debtor and nominated a trustee. He appeared before the Interstate Commerce Commission in Washington, D. C. on December 12, 1939 and objected to the confirmation of one of the Trustees named by the bankruptcy court. He appeared before the bankruptcy court on December 13, 1939 on the application of the Debtor for instructions as to whether it should pay any part of the taxes assessed by the State for the year 1939 and filed an answer praying that the Debtor be directed to

pay 60% of said taxes, or $2,049,553.23; and Order No. 11, so directing, was entered on December 26, 1939. The Trustees duly paid said sum to the Treasurer of the State of New Jersey. He appeared before the bankruptcy court on June 12, 1940 on the Trustees' petition for authority to [fol. 187] pay six monthly installments of $100,000 each on account of the taxes assessed against the Debtor for the tax years 1932 and 1933 and urged that the Trustees be required to pay not less than $200,000 per month, or a total of $1,200,000; and on June 13, 1940 the bankruptcy court entered Order No. 53 directing the Trustees to pay $150,000 per month, or a total of $900,000. The Trustees duly paid said sum in full to the Treasurer of the State of New Jersey. The Attorney General appeared again on December 2 and 16, 1940 concerning payment of the taxes assessed by the State against the Debtor for the year 1940 and filed an answer urging the bankruptcy court to require full payment; and Order No. 72 was entered on December 2, 1940 directing payment of 60% of said taxes. The Trustees duly paid said sum to the Treasurer of the State of New Jersey. He appeared on December 13, 1944 on the hearing of the Trustees' application made pursuant to Section 77 (o), 11 U. S. C. A. 205 (o), to sell at private sale and free from liens certain property of the Debtor known as the Atlantic Highlands Pier, the proceeds to be held subject to liens, and objected to the entry of Order No. 259 dated December 16, 1944 authorizing such lien-free sale. He has appeared in opposition to an application by the Trustees to create a separate operating company for the leased lines of the Debtor situated in Pennsylvania, upon which application no order has yet been made.

20. As stated in the report of the Special Master dated January 17, 1945 and as shown by the exhibits introduced in evidence before the Special Master on December 19, 1944 and by stipulation between the parties at said hearing, the action of the Comptroller of the State of New Jersey in signing and verifying the proofs of claim filed with the Trustees of the Debtor was substantially identical with his action in signing and verifying proofs of claim against each [fol. 188] other railroad under reorganization against which the State has asserted tax lien claims; and in each such other case the Attorney General of the State of New Jersey has been named and has acted as counsel for the State. Said

other proceedings in which said state officers have so acted have been those for the reorganization of the New York, Susquehanna and Western Railroad Company, Erie Railroad Company and Northern Railroad of New Jersey.

It is further stipulated that any party may refer to or quote *in extenso* any of the orders, minutes, exhibits or other portions of the record in the bankruptcy court, in his brief or at the oral argument of No. 8861 and No. 8889, or either of them, or in the course of any review of the judgment or judgments entered therein.

[fol. 189] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8889

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor; STATE OF NEW JERSEY, Appellant

ORDER ASSIGNING HON. JEROME FRANK FOR ARGUMENT—Filed June 20, 1945

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 20th day of June A. D. 1945, it is ordered that Hon. Jerome Frank, U. S. Circuit Judge, for the Second Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

[File endorsement omitted.]

[fol. 189a] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8889

[Title omitted]

MINUTE ENTRY OF HEARING—June 20, 1945

And afterwards, to wit, the 20th day of June, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs,

before the Honorable Herbert F. Goodrich, Honorable Jerome Frank and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 15th day of November, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 190] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8861

In the Matter of THE APPLICATION OF THE STATE OF NEW JERSEY FOR A WRIT OF PROHIBITION

No. 8889

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor; STATE OF NEW JERSEY, Appellant

On Appeal from Order No. 271 of the United States District Court for the District of New Jersey

In Proceedings for Reorganization of a Railroad

Before Goodrich, Frank and McLaughlin, Circuit Judges

[fol. 191] OPINION OF THE COURT—Filed November 15, 1945

By McLAUGHLIN, Circuit Judge:

These matters have to do with taxes allegedly due and owing the State of New Jersey from the Central Railroad Company. As such, they are a part of a long line of litigation which has for several years occupied the Federal Courts and both the judicial and other branches of the State Government.[1]

---

[1] See Central Railroad Company of New Jersey v. State Board of Tax Appeals, 109 N. J. L. 395 (S. Ct. 1932); Central Railroad Company of New Jersey v. State Tax Department, 112 N. J. L. 5 (E. & A. 1933), cert. den. 293 U. S. 568;

In order to better understand the present matter it might be well to outline what has gone before.

(A) The State Litigation

In regard to its assessment for the year 1931, the Company complained to the State Board of Tax Appeals as to certain valuations and assessments "because the average rate of taxation for the year 1931 of prosecutor's property is thereby higher than it should be." The Board dismissed the complaint. The Company thereupon appealed to the New Jersey Supreme Court, which refused to disturb the assessment as it stood. The New Jersey Court of Errors and Appeals unanimously affirmed that judgment.

The Company appealed the assessment for the year 1932 to the State Board of Tax Appeals, which, after hearing, affirmed the assessment. There was no attempt to have the judgment reviewed.

The Company also appealed the 1933 assessment to the State Board of Tax Appeals. The Board, after hearing, affirmed the assessment. An appeal was taken to the [fol. 192] Supreme Court, which sustained the Board, holding that the method of assessment was legal and that the Company had not been wronged thereby. Central R. R. *vs.* Thayer-Martin, 114 N. J. L. 69.

The Company appealed the assessments for the years 1934, 1935 and 1936 to the State Board of Tax Appeals urging that: (a) The properties were assessed in excess of their true value; (b) The method of valuing was erroneous and improper; and (c) The assessment of railroad property was discriminatory. The Board, after reviewing extensive evidence as to the above, affirmed the assessments for all three years. There was no appeal from those judgments.

The Company appealed the assessments for the years 1937 and 1938 to the State Board of Tax Appeals. On that

---

N. J. Tax Reports, 1912-1934, page 680; N. J. Tax Reports, 1912-1934, page 675; 114 N. J. L. 69; 19 Fed. Supp. 63 (1936); 100 F. 2d 1939 (1938), cert. den., 306 U. S. 651, rehearing denied, 306 U. S. 669; N. J. Tax Reports, 1934-1939, page 82; N. J. Tax Reports, 1934-1939, page 233; 30 Fed. Supp. 41 (1939), rev. 115 F. 2d 968 (1940), cert. den. 313 U. S. 568; 19 N. J. Misc. 427; 20 N. J. Misc. 283; 136 F. 2d 633 (C. C. A. 3, 1943)

appeal, in addition to numerous other points, the Company urged: (a) Deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution: (b) A denial of equal protection of the laws in violation of Article IV, Section 7, Paragraph 12 of the New Jersey Constitution; (c) A denial of equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution; (d) A burden upon interstate commerce in violation of Article I, Section 8, of the Federal Constitution. After a lengthy hearing involving some 4600 pages of testimony and 450 exhibits the Board affirmed the assessments. There was no appeal from that decision.

The State Tax Commissioner, after making the 1939 assessments, revised them downward. The City of Jersey City appealed to the State Board of Tax Appeals, which, after a hearing at which the Company, the State and the City of Jersey City adduced testimony, restored the original valuations. 20 N. J. Misc. 283, 26 Atl. (2d) 733. No review of that judgment was sought in the State Courts. As will be mentioned, infra, however, the Bankruptcy Court later set aside the judgment in its Order No. 171; this latter order was itself set aside by the Third Circuit Court of Appeals as reported in 136 F. 2d 633 (1943).

[fol. 193] (B) The Federal Litigation Preceding Bankruptcy

The Company petitioned the United States District Court for the District of New Jersey for a permanent injunction restraining the collection of taxes assessed against it for the years 1932 and 1933. In its petition the Company alleged a denial of due process of law, denial of equal protection of the laws and subjection of interstate commerce to an undue burden. The District Court held that the charges were not established by the evidence and denied the relief sought. 19 Fed. Supp. 63 (1936) (Opinion by Judge Forman). The Company appealed to the Circuit Court of Appeals for the Third Circuit which affirmed the judgment of the District Court. 100 F. 2d 139. (Opinion by Judge Biggs.) The Court held, inter alia, that the evidence had not supported the Company's allegations and that the question of violation of Federal Constitutional guarantees was res adjudicata, having been decided by the

New Jersey Supreme Court in 1933 in the case of Central Railroad *v.* Thayer-Martin, 114 N. J. L. 69, supra. The United States Supreme Court denied certiorari. 306 U. S. 651, rehearing denied, 306 U. S. 669 (1939).

The Company again brought suit in the Federal District Court seeking an injunction against the collection of the taxes as assessed for 1934, 1935 and 1936. The District Court sustained most of the Company's contentions and issued an injunction prohibiting the State from collecting more than 60% of these taxes until the property in question should be re-valuated in a manner consistent with the opinion of the District Court. 30 Fed. Supp. 41 (Opinion by Judge Forman). The injunction was later modified to 70% The Circuit Court of Appeals reversed that judgment. 115 F. 2d 968 (C. C. A. 3) (Opinion by Judge Maris). The Court held that the evidence did not establish the contentions of the Company and that the question of the validity of New Jersey's method of taxing railroad property was res adjudicata by virtue of Central Railroad *v.* Thayer-Martin, 114 N. J. L. 69, supra.

[fol. 194] (C) Federal Litigation after Bankruptcy

On October 30, 1939, the Central Railroad Company filed its petition under Section 77 of the Bankruptcy Act. The Company then owed balances on its taxes for the years 1932 to 1939 inclusive. The Comptroller of New Jersey filed proofs of claim for those taxes with the Bankruptcy Court, and, notwithstanding the decisions of this Court adverse to the Company as reported in 100 F. 2d 139, cert. denied 306 U. S. 651, and 115 F. 2d 968, cert. denied 313 U. S. 568, the Trustees of the Debtor once again raised the same issues as to the same years, before the Bankruptcy Court.

Meanwhile, the New Jersey Legislature passed the so-called Settlement Acts, which sought to forgive the railroads part of their indebtedness to the State. These Acts were contested by the Attorney General of New Jersey and declared unconstitutional by the New Jersey Supreme Court, 133 N. J. E. 447, affirmed by the Court of Errors and Appeals, 135 N. J. E. 244. While this litigation was pending the Bankruptcy Court issued its Order No. 163, fixing the amount due the State from the Debtor as the amount fixed in the Settlement Acts. On appeal to this Court, Order No. 163 was set aside. In re Central Railroad, 136 F. 2d 633. (Opinion by Judge Maris).

On August 12, 1944, following the decision of the New Jersey Court of Errors and Appeals declaring the Settlement Acts unconstitutional, the Trustees petitioned the Bankruptcy Court to adjudicate "the relative rights, claims, liens and priorities" in the assets of the Debtor. The State, through its Attorney General, appeared specially and moved for the dismissal of the petition "insofar as the liens of the State for taxes and interest are sought in anywise to be altered, affected, modified or destroyed," contending that the Bankruptcy Court was without jurisdiction, in the premises, to bind the State in that matter. The Bankruptcy Court refused to pass on this jurisdictional question, referring it, together with the matters which had already been extensively litigated as outlined above, to a Special Master. The Court did this in its Order No. 250, from which an appeal is pending in this Court.

[fol. 195] The Special Master started hearings on December 19, 1944. The Master did not seem to be disposed to hear argument on the jurisdictional question but upon protest by the State he did so. Upon conclusion of the argument he stated that he would proceed the following day with a hearing on the merits, before he decided the jurisdictional matter. On January 17, 1945 he filed an interim report, stating that the Bankruptcy Court is "the proper Court to determine the validity and amount of the tax claims of the State of New Jersey and the incidental liens alleged to affect the property in the custody of the Court." The State thereupon protested that the Master had not squarely met its objections to the jurisdiction of the Bankruptcy Court. On February 7, 1945 the State requested a decision on this matter from the District Judge. Notice was then given that the hearing would proceed before the Master; the State again protested that no hearing should be had on the merits until the District Judge had decided the question of jurisdiction. On February 20th these arguments were made to Judge Fake and the next day the Judge informed the State that he had determined he did have jurisdiction. He made a finding confirming the Master's interim report.

The State thereupon petitioned this Court, praying for a writ of prohibition forbidding the Bankruptcy Court from making any adjudication in connection with the tax liens of the State that was intended to be binding on the

State. That petition is one of the matters now before us. In the meantime, the District Court, again over the strenuous objections of the State, issued its Order No. 271 confirming the Master's Report. The State has appealed from Order No. 271 and that appeal is also before us.

The problem confronting us is substantially: Whether a District Court, in the course of its general supervision of a Section 77 Debtor, can make an adjudication concerning the validity of tax liens which had attached to the property of the Debtor prior to the filing of the petition in Bankruptcy, when those assessments upon which the liens are based have previously been held valid upon appeal by the taxing authority of a State and when the highest Court [fol. 196] of the State and the United States Circuit Court of Appeals have previously held the method of assessing those taxes to be legal and valid, and

If the above question is answered in the affirmative, what limitations exist upon the power of the Bankruptcy Court to so adjudicate.

Analysis of New Jersey's Method of Taxing Railroad Property During the Taxable Years

(1) Method of assessing the taxable property.

The laws of New Jersey in effect during the taxable years in the instant case provided substantially as follows:

Throughout our discussion of the New Jersey taxing machinery reference is made to statutes, some of which represent amendments made as late as 1933. Although these amendments were made later than the first taxable year, 1932, it is not deemed necessary to note the changes from the former law, since in every case the rights of the taxpayer on the one hand and the duties of the taxing authorities on the other, were substantially the same throughout the taxable period.

The Statutes of New Jersey provided that all the property of a railroad not used for railroad purposes should be assessed and taxed by the same assessors, in the same manner and at the same rate as the taxable property of other owners in the same taxing district.[2] All property of a

---

[2] N.J.S.A. 54:20-1*

* Indicates statute repealed by L. 1941, c. 291, p. 798, Section 75. Effective July 22, 1941.

railroad used for railroad purposes was to be assessed and taxed by the State Tax Commissioner.[3] It was provided that the State Tax Commissioner should sit at the State Capitol on the first Tuesday of March in each year and as often during the year and at such places as his duties should require for the purpose of ascertaining the true value, as of the first day of January preceding, of all the property of each railroad used for railroad purposes [fol. 197] in the state, including its franchises.[4] The Commissioner was required to ascertain: (I) The length and value of the main stem in each taxing district; (II) The value of the other real estate used for railroad purposes in each taxing district in the state, including the roadbed (other than the main stem), tracks, buildings and all other real estate except lands not used for railroad purposes; (III) The value of all the tangible personal property of each railroad company, and (IV) The value of the remaining property, including the franchise. He was required to complete these valuations by the first day of November following, and on or before December tenth next following he was required to serve upon the treasurer of each railroad company or leave at his office a statement of the assessed valuation of the property of such company in the state and of the separate valuation of the property of such company in each taxing district.[5] The assessors of all taxing districts where property of a railroad not used for railroad purposes should be assessed, if required to do so by the Commissioner, were to certify and send to the Commissioner on or before the second Monday in June following the first day of January as of which the property was valued, a statement giving the description of such property and showing the assessed valuation thereof. They were required, at the same time, to certify and send him a short description of all the real property in their respective taxing districts, used or owned for railroad purposes excepting the main stem or roadbed and track not exceeding one hundred feet in width of each railroad.[6] The assessors were also required to certify to

---

[3] N.J.S.A. 54-20-2*

[4] N.J.S.A. 54:22-1*

[5] N.J.S.A. 54:22-1*

[6] N.J.S.A. 54:22-3*

the Commissioner the local rate of taxation for county and municipal purposes as soon as it should have been determined, and such other information obtained in the course of the performance of their duties as the Commissioner should require of them.[7] In order to obtain the facts neces- [fol. 198] sary for the discharge of his duties the Commissioner was empowered to use any lawful means he deemed necessary. Thus he was empowered to employ surveyors if dissatisfied with information otherwise obtainable, and could employ such assistants in making his valuations as should be necessary to complete them in due time.[8] Each company running, operating or constructing a railroad in New Jersey was required on or before March first in each year to return to the State Tax Commissioner statements or schedules showing its property as it existed on the first day of January preceding; the information required in this statement was very extensive and exhaustive, but it need not be gone into in detail here.[9] If the returns were not made the Commissioner was required to ascertain the necessary facts from the best information he could obtain and in such manner as he should find convenient, using his personal knowledge and judgment.[10] Upon his completion of the valuation of the property described in subdivisions I, II, and IV, supra, pages ——, the Commissioner was required to assess such property and proceed to compute the tax thereon at the "average rate of taxation."[11] This "average rate of taxation" was computed in the following manner: On or before April first in each year the assessor in every taxing district was required to prepare and forward to the State Tax Commissioner a certificate, under his hand and seal, duly sworn to under oath, certifying to the Commissioner the true value of all property, real and personal, located in his taxing district, other than the property of railroad and canal companies the taxation of which was provided for in the Statutes here analyzed but including therein the assessed value of railroad and canal companies particularly

[7] N.J.S.A. 54:22-4*
[8] N.J.S.A. 54:22-5*
[9] N.J.S.A. 54:23-1*
[10] N.J.S.A. 54:22-5*
[11] N.J.S.A. 54:24-2*

described in Subdivision II, supra, page , and he was required also to certify and report the rate of taxation in his taxing district for that year. The aggregate value of all the property, real and personal, so certified, was deemed to be the aggregate value of the general property in the [fol. 199] state. In each taxing district the amount obtained by multiplying the value of all the property in the taxing district by the rate of taxation therein was deemed to be the total taxes of the taxing district, and the aggregate of the total taxes so ascertained was deemed to be the aggregate taxes of the state. The "average rate of taxation" was computed and determined by the Commissioner by dividing the aggregate taxes by the aggregate value of the general property in the state. The rate so arrived at and determined was entered upon the records of the State Tax Department and constituted the "average rate of taxation" for that year.[12] If an assessor in a taxing district failed to make the required certificate, the State Tax Commissioner was required and empowered to ascertain, in such manner as he deemed most practicable, the aggregate value of all the property in the taxing district required to be included in such certificate and the total taxes in such district. The amounts fixed by the Commissioner were deemed to stand as the aggregate value and the total taxes for the year for the taxing district.[13] In regard to that type of property classified under subdivision II, page 11, supra, on or before December tenth following the completion of his valuation in each year the State Tax Commissioner was required to certify the value of the real estate used for railroad purposes in each taxing district, classified under subdivision II, to the county boards of taxation in the several counties and to the assessors in the several taxing districts in which the property was situated. The statute so ordering provided that the right of hearing provided by law should in no way be restricted or abridged.[14] The value of the property so certified was required to be included in the amount of ratables to be taxed in the several taxing districts, and the necessary tax rate and the amount of the ratables for such districts were

---

[12] N.J.S.A. 54:24-3*

[13] N.J.S.A. 54:24-4*

[14] N.J.S.A. 54:24-8*

required to be ascertained by the county board of taxation in each county and certified to the State Tax Commissioner on or before the first day of April following the receipt [fol. 200] from the State Tax Commissioner of the certificate of values mentioned in the preceding sentence.[15] Upon receipt of the certificate from the county boards the Commissioner was required to include in the taxes to be assessed by him upon the railroad property, payable in that year, a tax upon the property classified under subdivision II, supra, page 11, at the rate in each taxing district so certified by the county boards of taxation and the said property was not subject to any other tax.[16]

(2) Method of Reviewing Assessments by the State Tax Officers

(a) On the first Monday of July after the filing of the returns, the Commissioner was required to sit at the State House at Trenton, and to give all companies interested a hearing, touching the valuation and assessment of their property. He was empowered to adjourn from day to day, and could, if he saw fit, require all arguments and communications to be presented in writing.[17] The Commissioner was further required to sit on the second Monday of January in each year at the State House, Trenton, for the purpose of reviewing his assessments of railroad property made as of January first of the previous year; he was empowered to adjourn from time to time until he should have finished the hearings.[18] Any railroad or the Attorney General on behalf of the state and of the taxing districts, claiming that error had been made in the assessment of railroad property, could, on or before the second Monday of January, file a complaint specifying the grounds of complaint and the relief sought; the State Tax Commissioner was thereupon required by statute to review the said assessment and correct the same as should appear just.[19] Ample provision was made for notice to the interested parties.[20]

---

[15] N.J.S.A. 54:24-9*

[16] N.J.S.A. 54:24-10*

[17] N. J. S. A. 54:26-1*.

[18] N. J. S. A. 54:26-2*.

[19] N. J. S. A. 54:26-3*.

[20] N. J. S. A. 54:26-4*.

[fol. 201] The Tax Commissioner on said review was empowered to issue subpoenas and examine witnesses and call for the production of books and papers. Also, he was entitled to use his personal knowledge and judgment as to the value of the property.[21] The Attorney General or his deputy attended the hearings as representative of the State.

(b) Any railroad company, or the Attorney General on behalf of the State, or, in respect to second-class property, the authorities of the taxing district, desiring to contest the final determination of the State Tax Commissioner upon review, or the validity or amount of the tax levied upon the railroad company, or any railroad company or the Attorney General on behalf of the State and of the taxing districts claiming that there had been illegal discrimination in the assessment of any property or in the levying or imposing of the tax thereon, or that there had been illegal discrimination in the assessment of railroad property as compared with the assessment of property generally, could, under the statutes, on or before the third Monday of June following the levying or imposing of the tax, file a written complaint with the State Board of Tax Appeals, specifying the grounds of complaint and the relief sought.[22] Ample provision was made for notice to all interested parties.[23] The State Board of Tax Appeals was required to meet on the third Monday of June in each year at the State House in Trenton for the purpose of fixing a time and place for the hearing of any complaint so filed. The Attorney General or his deputy represented the State at such hearings. If it was made to appear upon such hearing that any such assessment or tax was illegal, excessive, insufficient, or that there had been illegal discrimination in the assessment, the Board was required to correct, adjust and equalize the assessment and tax of such property.[24]

[fol. 202] (3) Judicial Review of Tax Assessments

If any railroad company, or the Attorney General on behalf of the State, or in respect to second-class property,

---

[21] N. J. S. A. 54:26-4*.

[22] N. J. S. A. 54:26-7*.

[23] N. J. S. A. 54:26-8*.

[24] N. J. S. A. 54:26-9*.

if the authorities of any taxing district desired to contest the final determination of the State Board of Tax Appeals, such contest could be made under the statutes by certiorari, provided that the application therefor was made within three months from the date of the certification to the State Tax Commissioner of the final determination of the State Board of Tax Appeals.[25] If the Supreme Court allowed the writ to a railroad company, the latter was obligated to pay that portion of the tax not in dispute as a condit-on precedent to prosecuting the writ. The payment of the part in dispute was stayed until the controversy had been determined by the Court. If it was made to appear before the Supreme Court on the writ of certiorari that the final determination of the State Board of Tax Appeals in respect to any such assessment or tax in controversy was illegal, excessive, insufficient, or that there had been illegal discrimination in the assessment, the Court was required by statute to correct, adjust and equalize such assessment and tax or refer the same back to the State Tax Commissioner who was then required to correct, adjust and equalize the assessment and tax in accordance with the instructions or decisions of the Court.[26] The statutes provided that in any suit or proceeding, except on such complaint before the State Board of Tax Appeals or on such certiorari, the certificate and report of the State Tax Commissioner should be conclusive and should have the force and effect of a judgment of a Court of record having competent jurisdiction, and the proceeding whereon such certificate and report were founded should not be inquired into.[27] The judgment of the Supreme Court on certiorari may be reviewed by New Jersey's highest tribunal, the Court of Errors and Appeals.

[fol. 203] **The Applicable Law**

To recapitulate very briefly, certain taxes are allegedly owing the State of New Jersey for the years 1932-1939. Those taxes fell due prior to the petition of the Debtor in bankruptcy. Although there had been a great deal of litigation in the matter antedating the bankruptcy petition, all of which ended finally in decisions against the now Debtor,

---

[25] N. J. S. A. 54:26-11*.

[26] N. J. S. A. 54:26-12*.

[27] N. J. S. A. 54:26-13*.

the trustees of the Debtor, after the bankruptcy, petitioned the Bankruptcy Court to determine the validity of these taxes and, in effect, asked that the taxes be materially reduced. As authority for such action by the Bankruptcy Court, they cite Section 64 (a) of the general Bankruptcy Act, 11 U. S. C. Section 104 (a). This section reads, in part, as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates * * * shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State * * *: Provided * * * That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the [Bankruptcy] court * * *."

The District Court has issued an order confirming a Master's Report, which latter purports to find jurisdiction in the District Court. We are asked to review the legality of that order.

The case of Arkansas Corporation Commission et al. *vs.* Thompson, 313 U. S. 132, is directly in point. It is interesting to note that the Attorney General of New Jersey filed a brief in that litigation as amicus curiae. The question there involved, in the language of the Court, concerned "the right and power of a federal bankruptcy court to revise and redetermine for state tax purposes the property value of a railroad (Missouri Pacific) in reorganization under Section 77 of the Bankruptcy Act, the state (Arkansas) having already determined such value through its own taxing officials and in accordance with the procedure prescribed by [fol. 204] valid state legislation." The District Court held that it did have such power and the Circuit Court of Appeals affirmed. 116 F. 2d 179 (C. C. A. 8). The United States Supreme Court reversed that decision. Mr. Justice Black, speaking for the Court at pages 142 and 145, said:

> "It is thus obvious that the trustees' petition which the bankruptcy court refused to dismiss, rested entirely upon the assumption that Section 64 (a) (4) gave the bankruptcy court power to hold a completely new hearing in order to set its own value on the property, regardless of the value fixed by the state through its expert and specially constituted quasi-judicial agency.

"But we do not so interpret Section 64 (a) (4). What Section 64 (a) (4) relates to is 'taxes legally due and owing by the bankrupt.' And what that section further provides is that 'in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; * * *.' Nothing in this language indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact—the value of the property taxed. Manifestly, whether or not taxes are 'legally due and owing' to a state depends upon the valid laws of that state. Ad valorem taxes depend upon a determination of value. The governmental function of fixing the value for tax purposes has rarely, if ever, been a judicial function. The 'legality' of the action of Arkansas in entrusting the determination of value to its Corporation Commission is not challenged here, as of course it could not be. If the Commission properly found the value of the property, the 'amount' of the taxes is not in question. For it is not asserted that the Commission made an improper arithmetical computation in applying the legal tax rate to the determined property value."

The Court goes on to distinguish the Arkansas case from the case of New Jersey *vs.* Anderson, 203 U. S. 483, saying:

"But in that case the trustee argued in his brief before this Court that under controlling New Jersey law [fol. 205] 'the assessors acted ministerially, not judicially, their 'determination was merely computation,' and their actions exceeded their statutory authority.

"The Arkansas Corporation Commission, however, does not act ministerially. On the contrary, it is a quasi-judicial agency entrusted with wide responsibilities in connection with the general tax system of the state. Upon it the state relies for the hearing and determination of matters essential to the maintenance and fair functioning of a uniform tax system.

* * * * * * *

"If the trustee had availed himself of his right of appeal to the courts of Arkansas, with an ultimate right of appeal to this Court for final determination of federal questions, it is difficult to believe that it would now be seriously argued that Congress, by Section 64 (a) (4), intended to impose upon the bankruptcy court the unusual power and delicate duty of trying out afresh the facts found by the state with relation to the value of property. And there is no more reason to assume that Congress intended that the bankruptcy court should fail to give respect to an unappealed determination of value made by the Arkansas Corporation Commission. Bankruptcy and reorganization proceedings today cover a wide area in the business field. But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as super-assessment tribunals over state taxing agencies. The express legislative purpose of Arkansas to move towards a more nearly uniform and fairly distributed tax burden through relying on supervision by a single agency could be in large part frustrated by the construction of the Bankruptcy Act for which the trustee here contends. Section 64 (a), thus construed, would tend to obstruct, and not to facilitate, the enforcement of state tax laws. Nothing in the language of the Act requires such a construction. And the policy of revising and redetermining state tax valuations contended for by the trustee would be a complete reversal of our historic national policy of federal noninterference with the taxing power of the states.

[fol. 206] "For the reasons given, it is our opinion that the District Court should have dismissed the trustee's petition."

The Arkansas opinion was filed in 1941. In 1944 this Court had occasion to interpret that decision in the case of In re Monongahela Rye Liquors, Inc., 141 F. 2d 864 where Judge Jones, for the Court, said at page 868:

"'The view we take of the decision in the Thompson case in that where, after a hearing, a quasi-judicial body, thereunto duly empowered, determines the amount of a tax due, with the right on the part of the

taxpayer to a judicial review of the determination, all conformable with the requirements of due process, such determination, upon becoming final by operation of law, is conclusive upon a court of bankruptcy save for mathematical error in the computation of the amount of the tax or legal error in its assessment. * * *".

The Circuit Court of Appeals for the Second Circuit discussed the Arkansas holding in Lyford *vs.* City of New York, 137 F. 2d 782. Judge Clark said at page 786:

"In that case the Court distinguishes the Anderson case, because in the latter the New Jersey tax assessors acted only in a ministerial capacity while the Arkansas Commission acted in a quasi-judicial capacity and had finally settled the tax upon the participation of the trustee, who then did not take the appeal provided by the State law. Hence in the Thompson case the assessment of the tax had become res adjudicata by virtue of the state proceedings when the bankruptcy court assumed the power to consider it. Moreover, the question involved was that of valuation of the property of the railroad in the state—a matter the courts generally would not review on appeals from administrative bodies and which the court concluded Congress did not intend should be reviewed in bankruptcy. In other words, the decision concerns a tax finally settled without appeal by the state authorities and an attack not on issues of legality, but on issues of valuation. Review in such a case involves the upsetting of state-taxing activities in ways beyond that [fol. 207] permitted as to administrative action generally, as had been pointed out by commentators and as was held by the Supreme Court."

Inherent in all of the decisions is the strong sentiment that the Federal Court should scrupulously refrain from interference with the tax-machinery of a state unless that machinery is serving to deprive a litigant of his federally guaranteed rights. In line with that basic policy Mr. Justice, now chief Justice Stone, in Healy *vs.* Ratta, 292 U. S. 263, a case involving an attempt in the Federal Courts to enjoin the collection of a state tax, says at page 270:

"Due regard for the rightful independence of state governments, which should actuate federal courts, re-

quires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. See Matthew *v.* Rodgers, supra, at 525 * * *."

The Rodgers case, cited in Healy *vs.* Ratta, supra, has again been referred to in what is perhaps the most recent re-enunciation of the principles governing federal interference with state tax matters, Lawrence Print Works *vs.* Lynch, 146 F. 2d 996 (C. C. A. 1). There Judge Peters says at page 997:

"The plaintiffs claim to have acquired the right to an abatement of taxes by virtue of an oral agreement with the assessors approved by the tax commission of Massachusetts. The claim was rejected and the right to abatement denied by the defendant board of assessors. It is apparent that the relief sought in this suit,—a compulsory reversal by the assessors of their action in laying taxes on the property of the plaintiffs without an abatement,—is a direct interference with the fiscal affairs of the state, which has been strongly condemned by the Supreme Court. Matthews *vs.* Rodgers, 284 U. S. 521, 525, 52 S. Ct. 217, 76 L. Ed. 447; Commonwealth of Pennsylvania *v.* Williams, 294, U. S. 176, 55 S. Ct. 380, 79 L. Ed. 841, 96 A. L. R. 1166; Great Lakes Dredge and Dock Co. *vs.* Huffman, 319 U. S. 293, 63 S. Ct. 1070, 1073, 87 L. Ed. 1407.

"The opinion in the Huffman case, decided in 1943, contains the following quotation from Matthews *v.* [fol. 208] Rodgers, supra: 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the Courts of the United States.'"

Comparing the functions of the Arkansas Tax Commission as set out in the Arkansas Thompson opinion with those of the New Jersey tax authorities, we find:

I. "Before entering upon his duties in the assessment of property, each member of the Commission [the Arkansas Commission] must subscribe to an oath that he will well and truly value and assess all property required to be assessed." 313 U. S. 132, at 139.

The State Tax Commissioner of New Jersey was required, before entering upon the duties of his office, to make and subscribe an oath, to be filed in the office of the Secretary of State, "that he will faithfully, impartially, and without fear, favor or prejudice discharge the duties of his office." N. J. S. A. 54:1-4. (This statute was repealed, L 1944, c 112, art. 8, Sec. 10, effective July 1, 1944. The repealer does not concern us.)

Each member of the New Jersey State Board of Tax Appeals was required, before entering upon the performance of his duties, to file with the Secretary of State an oath taken before a Justice of the Supreme Court, that he will faithfully discharge the duties of his office. N. J. S. A. 54:2-5.

II. "The Commission [Arkansas] has full power to summon witnesses and hear evidence, but further, before assessments are finally determined, all persons interested have the right, on written application, to appear and be heard." 313 U. S. 132, at 139.

[fol. 209] The New Jersey State Tax Commissioner was required to hold hearings for all companies interested on the first Monday in July et sequitur, touching the valuation and assessment of their property. N. J. S. A. 54:26-1 (supra page 15). He was further required to hold hearings on the first Monday of January et sequitur for the purposes of reviewing his assessments of railroad property. N. J. S. A. 54:26-2. (Supra, page 15-16). The Tax Commissioner on this review was empowered to issue subpoenas and examine witnesses and call for the production of books and papers. N. J. S. A. 54:26-4 (supra page 16).

Any person feeling aggrieved by the decision of the Commissioner could, upon the filing of a written complaint, appeal his decision to the State Board of Tax Appeals. N. J. S. A. 54:26-7 (supra page 17). That Board was required to grant a hearing to the complaining party and cor-

rect any inequities which were shown to exist. N. J. S. A. 54:26-9 (supra page 17).

III. "The Corporation Commission has been chosen by Arkansas as the ultimate guardian of the rights of the state and its taxpayers, subject only to that judicial review provided for by the state." 313 U. S. 132, at 139.

In New Jersey either the Attorney General on behalf of the State, or any railroad company could appeal any determination of the State Tax Commissioner to the State Board of Tax Appeals, calling upon the latter to adjudicate their respective rights. N. J. S. A. 54:26-7 (supra page 17).

The statutes provided that in any suit or proceeding, except on a complaint before the State Board of Tax Appeals or on certiorari to the Supreme Court, the certificate and report of the State Tax Commissioner should be conclusive and should have the force and effect of a judgment of a Court of record having competent jurisdiction, and the proceeding whereon such certificate and report were founded should not be inquired into. N. J. S. A. 54:26-13 (supra page 19).

[fol. 210] IV. "The Arkansas Corporation Commission • • • is a quasi-judicial agency entrusted with wide responsibilities in connection with the general tax system of the State. Upon it the State relies for the hearing and determination of matters essential to the maintenance and fair functioning of a uniform tax system." 313 U. S. 132 at 144.

The New Jersey State Board of Tax Appeals, if it was made to appear on a hearing that any assessment or tax was illegal, excessive, insufficient, or that there had been illegal discrimination in the assessment, was required to correct, adjust and equalize the assessment and tax of such property. N.J.S.A. 54:26-9 (supra page 17).

From the above and a study of the statutes governing the taxation of railroad property in New Jersey it is evident that both the State Tax Commissioner and the State Board of Tax Appeals functioned in a quasi-judicial manner. Hearings were always available to interested parties, as was the machinery to bring those hearings up to the standard required by due process. In no sense could the duties of the taxing authorities be classed as merely ministerial or arbitrary.

The second requirement of the Monongahela doctrine, that of the availability of judicial review, is equally well satisfied. Any party considering himself aggrieved by the decision of the State Board of Tax Appeals could appeal to the New Jersey Supreme Court by certiorari. N.J.S.A. 54:26-11 (page 18, supra). If any inequity was shown to exist, that Court was required to correct it. N.J.S.A. 54:26-13 (supra page 18). Moreover, the judgment of the Supreme Court could be appealed to the Court of Errors and Appeals.

As we see it, all of the foregoing serves to bring the instant problem within the doctrine of the Arkansas and Monongahela cases. That being so, the only matters left open for the Bankruptcy Court to pass upon are: (1) Mathematical error in the computation of the amount of the tax, or (2) Legal error in its assessment. In re Monongahela Rye Liquors, Inc., supra. On any question, if any, of "legal error in its assessment," we presume that [fol. 211] the District Court will bear in mind our decisions in 100 Fed. 2d 139 and 115 F. 2d 968 holding certain items to be res adjudicata and no longer open to further litigation. Failure of this opinion to touch upon certain points raised by the State of New Jersey is not to be construed as meaning that they are without merit: rather, our decision rend[illegible]s discussion of them unnecessary.

In No. 8889, Order No. 271 of the District Court is reversed. This disposes of the entire matter before us. The application for a writ of prohibition in No. 8861 is therefore dismissed, without costs to either party as against the other.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 212] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8889

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor; STATE OF NEW JERSEY, Appellant

JUDGMENT—Filed November 15, 1945

Present: Goodrich, Frank and McLaughlin, Circuit Judges.

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Order No. 271 of the said District Court in this case be, and the same is hereby reversed, with costs.

By the Court, Gerald McLaughlin, Circuit Judge.

November 15, 1945.

[File endorsement omitted.]

[fol. 213] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8889

[Title omitted]

ORDER DEFERRING ISSUANCE OF MANDATE—Filed November 26, 1945

On motion of Shelton Pitney and Walter P. Gardner, Trustees of The Central Railroad Company of New Jersey, Debtor, Appellees, it is on this 26 day of November, 1945, ordered that the issuance of a mandate in the above entitled cause be and the same is hereby deferred for a period of thirty (30) days from and after the 30th day of November, 1945.

Goodrich, C. C. J.

[File endorsement omitted.]

[fol. 214] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8889

[Title omitted]

ORDER DEFERRING ISSUANCE OF MANDATE—Filed December 22, 1945

On motion of Shelton Pitney and Walter P. Gardner, Trustees of The Central Railroad Company of New Jersey, Debtor, Appellees, it is on this 22 day of December, 1945, ordered that the issuance of a mandate in the above entitled cause be and the same is hereby deferred for a period of thirty (30) days from and after the 30th day of December, 1945.

Goodrich, C. C. J.

[File endorsement omitted.]

[fol. 215] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8889

[Title omitted]

ORDER DEFERRING ISSUANCE OF MANDATE—Filed January 18, 1946

It is on this 18th day of January, 1946, ordered that the issuance of a mandate in the above entitled cause be and the same is hereby deferred for a period of thirty (30) days from and after the 21st day of January, 1946.

Goodrich, J.

[File endorsement omitted.]

[fol. 216] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8889

[Title omitted]

ORDER DEFERRING ISSUANCE OF MANDATE—Filed February 21, 1946

It is on this 21st day of February, 1946, ordered that the issuance of a mandate and time for filing petition for rehearing in the above entitled cause be and the same is hereby deferred for a period of sixty days from and after the 21st day of February, 1946.

Goodrich, C. C. J.

[File endorsement omitted.]

[fol. 217] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8861

[Title omitted]

No. 8889

[Title omitted]

PETITION FOR REHEARING ON BEHALF OF WALTER P. GARDNER, TRUSTEE OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, DEBTOR—Filed March 21, 1946

[File endorsement omitted.]

[fol. 218] To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now Comes your petitioner, Walter P. Gardner, as Trustee of the Central Railroad Company of New Jersey, debtor, who respectfully represents that:

1. Since the opinion of this Court was filed on November 15, 1945, petitioner's co-trustee Shelton Pitney died on January 13, 1946, and the properties of the debtor have

since that date been and now are being operated by your petitioner as sole surviving trustee. Petitioner's time to file this petiton has been duly extended to April 20, 1946.

2. The opinion of this Court said:

> "the only matters left open for the Bankruptcy Court to pass upon are: (1) Mathematical error in the computation of the amount of the tax, or (2) Legal error in its assessment. • • •
>
> "In No. 8889, Order No. 271 of the District Court is reversed. This disposes of the entire matter before us. The application for a writ of prohibition in No. 8861 is therefore dismissed, without costs to either party as against the other."

3. Believing that this Court misconceived the questions involved on this appeal, petitioner directs attention to the fact that the issues before the Court were presented to the court below by the trustees in what they styled a "Petition for Adjudication". This petition did not raise the question of the assessment of taxes or the amount of taxes resulting from the assessment. Three interesting and important questions were raised by this petition: (1) Whether a valid and enforceable contract of settlement of the taxes in arrears had been made with the State of New Jersey by the trustees with approval of the court, pursuant to the Railroad Tax Settlement Act of New Jersey (Chapter 290, P. L. 1941, as amended by Chapter 241, P. L. 1942); [fol. 219] (2) whether the debtor's estate was liable to the State after the petition in reorganization was filed for penalties of twelve per cent per annum fixed by the statute, or for interest at three per cent per annum pursuant to the provisions of the Railroad Tax Settlement Laws; and (3) the Court was asked to determine the relative rights, claims, liens and priorities of the claimants in the assets of the debtor's estate. No one of these matters was decided by the Court on this appeal.

All the questions involved were carefully presented to the Court in the trustees' "Petition for Adjudication Concerning New Jersey State Tax Claims" (App. 55a-79a), and were brought he[illegible] in the appeal from Order 271. The prayer of said petition stated:

> "Wherefore petitioners pray that this Honorable Court, the premises considered, may promptly adju-

dicate (1) whether petitioners entered into a contract with the State of New Jersey, (2) whether such contract is binding on the parties thereto, (3) whether, if not binding on the State, petitioners are nonetheless bound by the prejudicial actions taken by them, (4) if not binding on the parties thereto including petitioners, to what extent, if at all, the proofs of claim of the State of New Jersey should be allowed, (5) what order should in such event be made to restore the equivalent of the *status quo ante* as nearly as may be and (6) what in such event are the relative rights, claims, *liens and priorities* of the claimants in the assets of the Debtor's Estate; and that this Honorable Court may instruct petitioners whether to make on or before December 1, 1944 the additional payment on account of the taxes claimed and the additional interest payment required by Chapter 290 of the Laws of 1941, as amended by Chapter 241 of the Laws of 1942."

[fol. 220] I

The question whether there was a valid contract of settlement between the trustees and the State.

4. Annexed to the Petition for Adjudication aforesaid as an exhibit was the State's proof of claim No. 38 for $12,117,450.68 taxes, plus interest thereon in the sum of $7,732,339.53, plus additional interest on said unpaid taxes from December 1, 1940 to date of payment. Paragraph 10 reads:

"(10) Lien, priority or preferential classification, if any, claimed for the claim, or any part thereof, the reasons therefor and full statement of the facts respecting same:

"The statute of New Jersey provides that these taxes shall be a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this State (Section 9, Chapter 208, P. L. 1888, as amended and supplemented; Section 54:27-4, Revised Statutes). The lien shall take effect on June 1 of the year in which the tax is payable."

This claim was dated December 10, 1940 and verified by the State Comptroller December 15, 1940 (App. 82a).

5. The Petition for Adjudication in paragraphs 12, 13, 14 and 15 shows that the Governor of New Jersey had appointed a committee to investigate the railroad tax problem, and after that committee filed a comprehensive report the Legislature enacted Chapters 290 and 291 of the Laws of 1941, approved and effective July 22, 1941; that by the provisions of Chapter 290 of the Laws of 1941 the State Treasurer was authorized and required to accept, without interest penalties, instalment payments of the [fol. 221] full balance of the principal amount of the taxes assessed for the years 1932 to 1940, inclusive, which remained unpaid on July 22, 1941, provided that a railroad taxpayer complied with the requirements of Sections 7 and 8 of said Act, which are quoted at page 62a of the Appendix. Paragraph 14 recites that on August 8, 1941 the Bankruptcy Court, after considering said offer of compromise contained in said statute, made and entered its Order No. 123 authorizing the trustees to accept the compromise offered in Chapter 260, P. L. 1941, by agreeing to pay the full unpaid balance of the principal amount of taxes claimed by the State for the years 1932 to 1940, inclusive, as authorized and provided for in said Act, without penalties but with interest at the rate of three per cent per annum computed from December 1, 1940, as required by the terms of said statutory offer.

In paragraph 15 the trustees recite that they caused to be filed with and delivered to the appropriate officers of the State all of the documents and payments required for full compliance by them with the conditions of said statutory offer and the provisions of said Order No. 123; and also caused to be filed with and delivered to the appropriate officers of the State all the documents and payments required for full compliance by the subsidiary roads.

Paragraphs 20 and 21 of the petition show that the trustees fully complied in all respects with Chapter 241 not only as to the taxes assessed by the State against the debtor for 1932 to 1940, inclusive, but also as to all taxes claimed from the trustees on account of taxes assessed against subsidiaries, and waived any and all rights to contest the legality or amount of the retroactive franchise tax for 1941 (im-

posed by said Act), which said tax petitioners paid in good faith and without contest, and for the recovery whereof the laws of the State provide no right or remedy. They also paid, as required, additional interest. They filed and delivered to the appropriate State officers all the [fol. 222] documents and payments required for full compliance by subsidiaries. Among the documents delivered to the State officers were discontinuances of appeals from taxes that were then in litigation.

6. The question presented was a comparatively simple question of bankruptcy law. The Court had control of the debtor and its estate. The State had filed with the Court a claim for large taxes and interest, and by so doing submitted itself and its claim to the jurisdiction of the Bankruptcy Court so far as the claim was concerned. Thereupon, the State Legislature passed a public law, which was approved by the Governor, offering the Bankruptcy Court to compromise the claim in a manner specified by the Act. This compromise need not have been accepted. The Court, however, made an order accepting the offer of compromise and directing its trustees to perform the conditions of the statute. The trustees did comply with the provisions of the statute, as recited in the Petition for Adjudication, paragraphs 14 and 15 (App. 62a-63a), and as directed by the order of the Court. By so doing the trustees gave up valuable rights belonging to the estate, as the Petition for Adjudication shows. In fact, they gave up every right they had further to contest, in any court, the claims for the taxes compromised, and, as the petition shows, they paid in full the franchise taxes for 1941 without contest, and from which they had a right to appeal.

7. All this took place before the Attorney General of the State instituted a proceeding in the Court of Chancery on September 4, 1941, attacking the constitutionality of the Railroad Settlement Act of 1941 (App. 63a, par. 16).

8. It is respectfully submitted that after such contract of settlement was made between the trustees in reorgani- [fol. 223] zation on the one hand, and the State of New Jersey, a creditor of the bankrupt which had appeared in the reorganization proceedings prosecuting its claim on the

other hand, with court approval, the only way in which said contract could be abrogated and set aside was on appeal to this Court and thence to the Supreme Court of the United States.

9. It is submitted that this contract is still in full force and effect. The trustees have scrupulously made tender to the State of each and every payment required by the settlement to this date, and in no respect is the debtor's estate or the trustee in default.

10. This Court, in *In re Central R. Co. of N. J.*, 136 Fed. (2d) 633 (decided before *Wilentz* v. *Hendrickson* was decided in the State Courts), reversed Order No. 163 signed by Judge Fake which adjudicated the amount of the State's claims and made them payable in the manner, at the times, with interest, and upon the terms and conditions prescribed by Chapter 241, P. L. 1941. This decision was on the ground that this order was based upon the assumption that the Tax Settlement Acts are valid, and was in no manner conditional upon the final outcome of the suit in the State Court. This Court, however, said that since the State law directed that the steps to comply with the Tax Settlement Acts must be taken on or before June 15, 1942:

> "It is vitally important to the Debtor in case the constitutionality of the Tax Settlement Acts is ultimately sustained, that the tenders made by the trustees prior to that date, pursuant to the directions of Order No. 163, be not invalidated by the reversal of that order. Accordingly so much of paragraphs 6 and 7 of Order No. 163 as authorizes the trustees to comply with the requirements of the Tax Settlement Acts will not be disturbed. • • •
>
> [fol. 224] "Order No. 163, insofar as it determines the tax liability of the Debtor to the State of New Jersey for the years 1932 to 1939 inclusive, and the validity of the Railroad Tax Settlement Acts, and Order No. 171 are reversed and the cause is remanded with directions to the District Court to await the determination by the Court of Chancery of the State of New Jersey of the constitutionality of the Railroad Tax Settlement Acts, unless it finds that delay which may be harmful to the Debtor and its creditors may result,

in which event it may proceed itself to hear and decide the constitutional issue."

Your Honors' opinion in the above case was filed May 27, 1943, and a rehearing was denied July 15, 1943. Five days later Vice Chancellor Jayne filed his opinion in the Court of Chancery holding that the Railroad Settlement Acts were unconstitutional under the title: *Wilentz* v. *Hendrickson*, 133 N. J. Eq. 447. This case was taken to the Court of Errors and Appeals, which filed its decision June 22, 1944, affirming the Court of Chancery, *Wilentz* v. *Hendrickson*, 135 N. J. Eq. 244. Within two months the trustees filed their "Petition for Adjudication" below which, among other things, raised the novel question as to the binding effect of the acceptance of the provisions of the State Act by the trustees under court order before the constitutionality of the Act was questioned where a valid consideration passed in the acceptance of the settlement, and where the *status quo ante* could not be restored.

The Court of Errors and Appeals held that the Railroad Tax Settlement Acts contravene Article 1, paragraph 20 of the New Jersey State Constitution, which provides:

"No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association or corporation whatever."

[fol. 225] But the opinion stated:

"Thus if the State has a vested right in and to the tax debt (delinquent interest) then unless the remission, cancellation and abatement of that right is supported by a 'legal, equitable or moral consideration' (In re Voorhees, supra), the challenged statutes clearly contravene, in spirit and in fact, the constitutional limitation (Article 1, paragraph 20) invoked."

The court found in said case, in which neither the Central Railroad Company of New Jersey nor its trustee was a party, that there was nothing in the proofs before the court "to support a moral or equitable consideration".

There was, however, ample consideration to support the settlement between the Central Railroad and its trustees and the State. The Reorganization Court, which had juris-

diction of the debtor's estate and the claim of the State, by its orders above referred to made the agreement of settlement an accomplished fact.

11. *Wilentz* v. *Hendrickson* is not *res judicata* on the question presented by the trustees' petition to the court below or in this Court, nor does it have the support of the doctrine of *stare decisis* under the rule in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, for the reason that the *Wilentz* case was tried on *ex parte* affidavits and on an agreed statement of facts, was between the Attorney General of the State as complainant and the State Treasurer as defendant, and resulted in a decree restraining the State Treasurer from complying with the Act. Justice Pitney, speaking for the New Jersey Supreme Court in *Rutten* v. *Paterson*, 73 N. J. L. 467, 475, said:

> "A decision based upon stipulated facts that results in declaring a law unconstitutional does not wipe the act from the statute books, but merely denies its efficacy to a party who had admitted the existence of [fol. 226] a state of facts that in the opinion of the court renders the law unconstitutional."

The opinion of the Court of Errors and Appeals was more in the nature of an advisory opinion:

See Annotated Cases, 1917a, 495, 496 and 497.

In re Opinion of the Justices, 266 Mass. 590, 165 N. E. 904.

"Consideration of Facts in Constitutional Cases" by Hon. Emmet H. Wilson, 17 S. Cal. Law Review 335.

Prall v. *Burckhartt*, 299 Ill. 19; 132 N. E. 280.

That the Act might be held unconstitutional in the contest between two State Officers and yet be constitutional as to the Central Railroad Company of New Jersey is indicated by the severability clause of the Railroad Tax Settlement Act, as amended by Chapter 241 of the Laws of 1942, 58 N. J. S. A. Cum. Poc. Supp. App. 4-7.1 *et seq.*, App. 4-7.16:

> "If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act, or the application thereof to other persons or circumstances shall not be affected thereby."

In *J. A. Dougherty's Sons* v. *Commissioner of Internal Revenue*, 121 Fed. Rep. (2d) 700, this Court said:

> "Although it was formerly held that an unconstitutional statute is a *nullity ab initio* (see Norton v. Shelby County, 118 U. S. 425 and Chicago, Indianapolis & Louisville Ry. Co. v. Hackett, 228 U. S. 559, 566), more lately it has ben recognized that the consequences of action taken or restricted in obedience to the requirements of a statute which subsequently is declared un- [fol. 227] constitutional are to be appraised and adjudged in the light of the compulsion exercised by the statute prior to its determined invalidity. * * * The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored."

See, also, *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374.

It would seem, therefore, that neither the decision of this Court in *In re Central R. R. Co.*, 126 Fed. 633, nor the decision of the New Jersey courts in *Wilentz v. Hendrickson*, 135 N. J. Eq. 244, operates to bar an adjudication of the question presented by the trustees' Petition for Adjudication.

12. It is respectfully submitted that the question whether or not the State of New Jersey is legally obliged to accept payment of debtor's taxes in arrears in instalments over a period of years, with interest at three percent per annum on unpaid instalments pursuant to the provisions of the Railroad Tax Settlement Acts, was properly presented to the Bankruptcy Court in the petition of the trustees for adjudication above mentioned, for one of the prime duties of the Bankruptcy Court is to determine the nature, validity and extent of claims against the debtor's estate.

Sec. 2a(2), Bankruptcy Act, 11 U. S. C. A. 11A2.
Sec. 57, Bankruptcy Act, 11 U. S. C. A. 93.

By reversing Order 271 this Court has foreclosed the Bankruptcy Court from passing upon this vital question.

[fol. 228] II

The question of the nature and extent of the State's liens against the property of the debtor.

The sixth prayer of the Petition for Adjudication was:

> "What, in such event, are the relative rights, claims, *liens* and *priorities* of the claims in the assets of the debtor's estate?"

We are confident that your Honors by your decision did not mean to rule that the District Court cannot determine the nature and extent and priority of the lien of the State for taxes. Nevertheless the language of the opinion is that "the only matters left for the Bankruptcy Court to pass upon are: (1) Mathematical error in the computation of the amount of the tax, or (2) legal error in its assessment."

The properties of the Central Railroad Company of New Jersey are located in both New Jersey and Pennsylvania. There is a $50,000,000 issue of bonds held by the public, secured by mortgage upon the debtor's real and personal property and franchises located in both New Jersey and Pennsylvania.

The New Jersey taxes are probably a lien upon the real estate of the debtor located in New Jersey, under Rev. Stat. 54:27-4, which reads as follows:

> "If the taxes of any company, or any portion thereof, remain unpaid on December first following the levying thereof, the company shall be considered in default, and such taxes, or the unpaid portion thereof, shall thenceforth bear interest at the rate of one per cent for each month until paid, notwithstanding the prosecution of a writ of certiorari or other remedy. These taxes shall [fol. 229] be a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this state. The lien shall take effect on June first of the year in which the tax is payable and shall be a debt due from the company to the state on that date for which an action at law or suit in equity may be maintained, and shall be a preferred debt in case of insolvency. These remedies are in addition to the special proceedings provided for in chapters 19 to 29 of this title (§54:19-1 et seq.)."

Since there was no levy upon or sale or seizure of the personal property of the debtor in the State of New Jersey by the State of New Jersey before the filing of the petition

for reorganization, and the appointment of the trustees, it is probable that the lien of the bondholders is prior to the claims of the State as to tangible and intangible personal property of the debtor located in New Jersey.

Bankruptcy Act, Section 67, 11 U. S. C. A. 107b and c (Pamphlet Section).

Bankruptcy Act, Section 64, 11 U. S. C. A. 104a1 and 2 (Pamphlet Section).

New York v. *Maclay*, 288 U. S. 290.

United States v. *Texas*, 314 U. S. 480.

City of New Orleans v. *Harrell*, 134 Fed. (2d) 399; C. C. A. 5th, 1943.

City of New York v. *Hall*, 139 Fed. (2d) 935; C. C. A. 2nd, 1944; Fank, J.

In re Pennsylvania Central Brewing Co., 114 Fed. (2d) 1010; C. C. A. 3rd, 1940; Biggs, J.; cert. den. 312 U. S. 685.

Sections 64 and 67 of the Bankruptcy Act are applicable to railroad reorganizations under Section 77.

Lyford v. *New York*, 140 Fed. (2d) 840; C. C. A. 2nd, 1944.

[fol. 230] It is thoroughly settled that only the Bankruptcy Court can determine the nature and extent of the liens against the debtor's estate and the priorities as between claimants.

Sec. 67, Bankruptcy Act, 11 U. S. C. A. 107.

City of New York v. *Hall, supra.*

Did your Honors, by your opinion intend to deny to the court below the right to pass upon the nature and extent of the liens of the State of New Jersey for taxes as against the bondholders under the mortgage? This is extremely important in this case where the bond issue is $50,000,000, interest thereon in arrears is $15,000,000, principal of taxes in arrears is approximately $13,000,000 (App. 55a), and interest and penalties to date at one per cent per month are approximately $16,000,000.

III

The Question of Interest and Penalties

Another interesting and important question incidentally raised by the Petition for Adjudication aforesaid is whether

the Bankruptcy Court must determine that the interest and penalties of twelve per cent per annum are collectible by the State as interest, or may reduce it to a modest rate on the ground that this is a penalty. The answer to this question must be in the affirmative. Sec. 57j, Bankruptcy Act, 11 U. S. C. A. 93J.

When it is considered that under a reorganization plan the State may be obliged to take a new issue of first lien bonds on the New Jersey real estate, and that holders of the presently outstanding bonds may have to take second lien bonds on a part of the property and first lien bonds on all other properties of the road, the importance of these questions becomes apparent.

[fol. 231] The Issues Argued on the Petition for Adjudication

When the Attorney General of New Jersey was served with the petition for adjudication he filed a special appearance and objected to the petition being entertained by the court on the ground that it constituted the prosecution of a suit, claim or demand against the State (App. 100a). He asserted in paragraph 3 that the petition appears to invoke the supposed jurisdiction of the District Court to enter determinations and adjudications which may affect, modify, impair or destroy the tax obligations to the State *"and the liens of the State therefor"* (App. 102a). He thereupon moved that the court dismiss the petition insofar as it prayed for an adjudication or determination that the claims for taxes are less than the sums assessed against the debtor, "and insofar as the liens of the State for such taxes and interest are sought in any wise to be altered, affected, modified or destroyed by any such adjudication or determination." Upon the filing of this special appearance of the Attorney General, and after a hearing held October 16, 1944, Judge Fake on motion of the trustees made an Order No. 250

> "That all tax claims filed by the State of New Jersey, the Trustees' objections thereto and the State's reply to said objections, and also the aforesaid purported special appearance of the State objecting to the jurisdiction of this Court filed herein on August 28, 1944 be and the same are hereby referred and re-referred to Augustus C. Studer, Jr., Esq., as Special Master, for hearing and report thereon." (App. 104a)

The Attorney General, on October 30, 1944, served on the debtor and its trustees, the trustee under its mortgage and the bondholders committees, a notice of appeal (App. 106a) to this Court from said order of reference made by [fol. 232] Judge Fake on October 16. The Special Master, on December 19, 1944, held a hearing on the said petition for adjudication and the special appearance of the Attorney General aforesaid, and on January 17, 1945, filed an interim report to the District Court in which he reported that in his opinion the entire property of the Railroad is *in custodia legis*, subject, however, to such rights as are given by law to lien holders. He further held and reported that the Bankruptcy Court is the proper court to determine the validity and amount of the tax claims of the State and the incidental liens alleged to affect the property in the custody of the court. He concluded with the statement:

> "It is the opinion of the Master that the claim of the State to sovereign immunity should be denied and that the petition of the Trustees should not be dismissed." (App., Interim Report, 148a-164a.)

The Attorney General, on January 27, 1945, filed objections on behalf of the State to the interim report of the Special Master, again urging:

> "In the present case the State has not voluntarily submitted its lien claims for enforcement or adjudication in the Bankruptcy Court nor has it lawfully been made a party. Nor can it be made a party to said proceedings without its consent with respect to such liens." (App. 165a-174a.)

On February 7, 1945, a hearing was held by Judge Fake on a motion of the trustees for an order confirming the Interim Report of the Special Master and the objections of the State, and on February 21, 1945, Judge Fake filed his opinion confirming the Special Master's Interim Report and holding that the District Court has jurisdiction of the questions presented by the petition for adjudication (App. 175a-176a).

[fol. 233] Order No. 271, dated March 5, 1945, overruled the objections of the State to the interim report of the Special Master dated January 17, 1945, and adopted it. (App. 177a-179a.)

On April 2, 1945, the Attorney General of New Jersey appealed to this Court from the whole of Order No. 271. In his statement of points on appeal the Attorney General alleged: (1) That the District Court erred in determining that the Bankruptcy Court had the power to make adjudications binding upon the State concerning statutory liens that were affixed in and to the property of the debtor as of the date of the filing of the petition in bankruptcy without the consent of the State; (3) that the Court erred in failing to hold that the Bankruptcy Court was without jurisdiction to make adjudications binding upon the State concerning the statutory liens of the State that were affixed at the time of the institution of the bankruptcy proceedings. (App. 181a.)

State's Petition for a Writ of Prohibition

On February 26, 1945, four days after Judge Fake filed his opinion overruling the Attorney General's objections to the Special Master's interim report, the State of New Jersey by its Attorney General prepared a petition to this Court for a writ of prohibition, addressed to the District Judge and the Special Master, to prevent them from proceeding with the determination of any matters or the making of any adjudication in connection with the tax debt liens of the State for the years 1932 to 1939 inclusive, in and upon the lands, tangible personal property and franchises of the Central Railroad Company of New Jersey, debtor, presently undergoing reorganization proceedings under Section 77 of the Bankruptcy Act (App. 12a-26a).

Upon the filing of this petition with this Court, his Honor, Judge Biggs, on March 9, 1945 (four days after the making [fol. 234] of Order No. 271 overruling the objections of the State to the interim report of the Special Master), granted a rule upon Judge Fake and the other Judges of the District Court and upon the Special Master to show cause why a writ of prohibition should not be issued as prayed for (App. 27a).

Under date of April 2, 1945, Judge Fake filed an answer in response to the order of this Court aforesaid in which he pointed out that the narrow jurisdictional issue presented to him was whether the proceeding on the petition for adjudication of the trusters amounted to a suit against the State of New Jersey. He pointed out that the State had filed in the reorganization proceeding proofs of claim

for its taxes; that objections thereto had been filed by the Trustees to which the State had filed its reply, and that he had referred all disputed claims to the standing Special Master together with all objections thereto for hearing and report.

Paragraph 9 of Judge Fake's answer points up the matter really in issue, which is as follows:

> "9. No party to the proceedings has challenged the principle of sovereign immunity or the principle that the custody and title of the Trustees of the Debtor of and to the estate *in custodia legis* is subject to pre-existing liens. However, the added and extended concept advanced on behalf of the State has been challenged, viz., the concept that the estate *in custodia legis* consists of 'only the interest of the Debtor *over and above*' liens and that 'the court has only that equity which the Debtor had immediately prior to the inception of the proceedings.' It is that argument or concept which has been rejected by said Order No. 271 and, as well, the assumption that the quantum, rank and extent of security of a lien claim asserted by a state must be accepted and the lien claim allowed exactly as [fol. 235] set forth by the State in its proof of claim and without any scrutiny or determination by the Bankruptcy Court of any issues raised with respect thereto by the Trustees and other parties to the reorganization proceedings."

Conclusion

It is respectfully submitted that the two proceedings taken by the Attorney General, which may well be termed "red herring" proceedings, have succeeded in diverting attention from the real questions involved in this case. Those proceedings were: (1) The special appearance of the Attorney General and his contention that a proceeding in the Reorganization Court to determine the nature and extent of the State lien for taxes and the priorities as between claimants is in fact a suit against the State without its consent; and (2) the petition for a writ of prohibition to forbid the District Court from making an adjudication concerning the tax liens of the State.

The opinion of your Honors, filed November 15, 1945, appears to treat the appeal as *involving the amount of the*

assessments and resulting taxes rather than the nature and extent of the liens of the State and the priority of the State's liens over other liens, *i. e.*, mortgage bonds.

The opinion of the Court filed on November 15, 1945, is divided into the following headings:

"(a) The State Litigation.

(b) The Federal Litigation preceding Bankruptcy.

(c) Federal Litigation after Bankruptcy.

Analysis of New Jersey's Method of Taxing Railroad Property during the Taxable Years.

1. Method of Assessing the Taxable Property.

2. Method of Reviewing Assessments by the State Tax Officers.

[fol. 236] 3. Judicial Review of Tax Assessments.

The Applicable Law."

Since the Court treated this appeal in its opinion as one involving the assessment and amount of taxes, which were not involved, and completely disregarded the questions presented by the petition for adjudication, we respectfully pray that a rehearing may be granted, to the end that these most important questions in the reorganization proceedings may speedily be determined, in accordance with the prayer of the trustees' petition for adjudication.

Dated, March 20, 1946.

Respectfully submitted, Walter P. Gardner, Trustee.

James D. Carpenter, Jr., of Counsel, P. O. Address, 75 Montgomery Street, Jersey City, N. J.

Certificate of Counsel

I, James D. Carpenter, Jr., appointed by Order of the District Court dated February 26, 1946, as counsel for the Trustee herein, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

James D. Carpenter, Jr.

[fol. 237] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 8861

[Title omitted]

No. 8889

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed March 28, 1946

Present: Goodrich, Frank and McLaughlin, Circuit Judges.

The petition for rehearing in these cases is denied.

By the Court, McLaughlin, Circuit Judge.

March 28, 1946.

[File endorsement omitted.]

[fol. 238] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief, as constituting the portions of the record before this court at argument; and proceedings in this court, in the Matter of Central Railroad Company of New Jersey, Debtor, Appeal of the State of New Jersey, No. 8889, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 9th day of April in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the United States the one hundred and seventieth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 238a] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 10, 1946

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order of May 20, 1946, denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 239] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 92

STIPULATION AND ADDITION TO RECORD—Filed August 1, 1946

It is hereby stipulated and agreed by and between the Debtor-Petitioner, through his attorney, James D. Carpenter, Jr., and The State of New Jersey, a Creditor, through its Attorney General, Walter D. Van Riper, by Benj. C. Van Tine, Deputy Attorney General, that the annexed portions of the record in the District Court of the United States for the District of New Jersey, in the proceedings for the reorganization of The Central Railroad Company of New Jersey, No. 29,778, shall form a part of the record in the above entitled appeal under a stipulation between the said parties set forth in the record below at pages 180a to 188a, inclusive,

1. Petition for an Order of Approval under Section 205 Title 11, United States Code, and for further relief, verification omitted.

2. Order No. 3 restraining David T. Wilentz, as Attorney General from entering judgment and issuing execution for collection of taxes for the years 1932 and 1933.

3. Petition for Order No. 7 instructing Debtor whether it should pay any part of the taxes assessed against its property by the State of New Jersey for the years 1939 and if so what part, verification omitted.

4. Affidavit in support of Petition for Order No. 7.

[fol. 240] 5. Order No. 7 to show cause why an Order should not be entered instructing Debtor whether it should pay any part of the taxes assessed against it by the State of New Jersey for the year 1939 and if so what part.

6. Parts of Minutes of Hearing before Hon. Guy L. Fake, U. S. D. J., December 13, 1939, pages 173 to and including first three lines at top of page 195.

7. Order No. 11 directing Debtor to pay $2,049,553.23 on account of taxes assessed against its property by the State of New Jersey for the year 1939.

8. Petition for Order No. 53 authorizing the Trustees to pay monthly installments on account of taxes assessed against property of the Debtor by the State of New Jersey for the years 1932 and 1933.

9. Minutes of Hearing before Hon. Thomas Glynn Walker, U. S. D. J., on June 12, 1940.

10. Order No. 53 authorizing the Trustees to pay monthly installments on account of taxes assessed against property of the Debtor by the State of New Jersey for the years 1932 and 1933.

11. Petition for Order No. 66 fixing the time within which and prescribing the manner by which claims of creditors shall be filed.

12. Parts of Order No. 66 fixing the time within which and prescribing the manner by which claims of creditors shall be filed, all of page 1049; paragraphs 1 and 3 on pages 1050 and 1051; paragraph 8, including Judge's signature and date of order, on page 1054.

13. Parts of Order No. 93 allowing certain claims and referring to Special Master certain disputed

claims and the objections thereto, and referring the question of priority of claims, pages 1487 and 1488 at middle of page; paragraphs 8, 9, 10, 11 and 12, including Judge's signature and date of order on pages 1492 and 1493.

14. Petition of Trustees for instructions concerning payment of certain taxes levied by the State of New Jersey, and for show cause order thereon No. 71.

15. Answer of State of New Jersey to Order No. 71 to Show Cause.

[fol. 241] 16. Order No. 72 directing the Trustees to pay certain amounts on account of New Jersey State taxes for which the Debtor is directly or indirectly liable.

17. Part of Reply of Claimant, State of New Jersey, to Trustees' objections to tax claims, pages 1 to 5 complete; first four lines on page 6 and prayer and signature on page 12.

18. Petition of the Trustees of the Debtor for authority to compromise, pursuant to Chapter 290 of the Laws of New Jersey of 1941, certain taxes levied by the State of New Jersey for the years 1932 to 1940, inclusive, etc.

19. Order No. 123 authorizing the Trustees of the Debtor to compromise, pursuant to Chapter 290 of the Laws of 1941, certain taxes levied by the State of New Jersey for the years 1932 to 1940, inclusive, etc.

20. Petition of Trustees for Order No. 135 instructing them concerning payment to the State of New Jersey of taxes levied against the Debtor and certain of its affiliated companies for the year 1941.

21. Parts of Minutes of Hearing before Hon. Guy L. Fake, U. S. D. J., November 24, 1941, pages 2269 to 2276, inclusive.

22. Order No. 135 instructing the Trustees to pay to the State of New Jersey on or before December 1st certain taxes levied against the Debtor and certain of its affiliated companies for the year 1941.

23. Petition of the Trustees for instructions whether or not they should comply with Chapter 241 of the Pamphlet Laws of New Jersey of 1942 and for Order

No. 161 requiring the Attorney General, the Comptroller, and the Treasurer of the State of New Jersey, and all other parties, to show cause why the amount of the tax claim of the State of New Jersey against the Debtor for the years 1932 to 1939 should not be fixed at the principal amount of taxes alleged to be due, payable in the manner, at the time, with the interest, and upon the terms and conditions prescribed by Chapter 241, and why the interest or interest penalties as claimed by or on behalf of the State of New Jersey in these proceedings should not be disallowed.

24. Order No. 161 to Show Cause.

[fols. 242-243] 25. Order No. 163 adjudicating the amounts in which the claims of the State of New Jersey should be allowed and directing the Trustees to comply with Chapter 241 of the Laws of New Jersey of 1942.

26. Petition of Trustee for Order for instructions regarding the payment of taxes to the State of New Jersey.

27. Order No. 333 authorizing and directing Trustee to make payment on account of taxes claimed by State of New Jersey.

28. Part of Minutes of Hearing before Hon. Guy L. Fake, U. S. D. J., April 26, 1946, pages 4783 to 4788, inclusive, and first three lines of page 4789; portion of page 4819 beginning with "My last exhibit" and ending with "This is not cross."; last three lines on page 4827 and pages 4828 to 4846, inclusive.

29. Receipt of Homer C. Zink, Commissioner, Department of Taxation and Finance of State of New Jersey, dated May 6, 1946.

It is further stipulated and agreed by and between the above parties through their attorneys that this Stipulation shall form a part of the record in the above entitled appeal.

James D. Carpenter, Jr., Attorney for Debtor-Petitioner; Walter D. Van Riper, Attorney General; By Benj. C. Van Tine, Deputy Attorney General Attorney for The State of New Jersey, a Creditor.

Dated: July 27th, 1946.

[fol. 244] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

Petition No. 1

No. —

PETITION

For an Order of Approval Under Section 205 Title 11, United States Code, and for Further Relief

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

The petition of The Central Railroad Company of New Jersey, a railroad corporation, hereinafter referred to as the Debtor, respectfully represents:

First: The Debtor is a railroad corporation organized and existing under the laws of the State of New Jersey; it is a common carrier by railroad engaged in the transportation of persons and property in interstate commerce, and is not a street, a suburban or interurban electric railway. During the six months' period immediately preceding the filing of this petition the Debtor has had, and now has, its principal operating office in Jersey City, New Jersey, in the District of New Jersey, and all of the railroad owned by the Debtor lies wholly within said State of New Jersey.

Second: Interest obligations of the Debtor have heretofore matured and remain unpaid, to and including October 1, 1939, in the amounts and on the dates following:

[fol. 245] Interest on Debtors' General Mortgage Bonds:

April 1, 1939, not paid when due	$343,530.00	
July 1, 1939, not paid when due	849,795.00	
October 1, 1939, not paid when due	343,542.50	
		$1,536,867.50

Debtor has paid on account of said taxes the following amounts:

1937	$2,161,737.57
1938	2,273,266.79

and has appealed to the State Board of Tax Appeals of the State of New Jersey to secure a review of the balance of said taxes. Said appeals are now pending and undetermined. On information and belief the taxes so assessed for said years are excessive and unlawful and said assessments were not made in accordance with the principles laid down by Judge Forman.

6. The statement of the taxes levied by the State of New Jersey against Debtor's property for the year 1939 [fols. 255-256] amounting to $3,415,922.05 was served on the Debtor on July 29th and under the provisions of New Jersey Revised Statutes 54:27-2 in so far as said taxes were valid, they became due and payable on any day up to and including December 1. Under date of August 3, 1939 the Debtor filed a complaint and appeal from said tax assessment to the State Board of Tax Appeals.

7. On information and belief the method by which the 1939 assessment was made was similar to the method used by the State in making the 1934, 1935 and 1936 assessments which Judge Forman held to be illegal.

8. In view of the above facts Debtor is advised that there is doubt whether any taxes are legally due by the Debtor for the year 1939, but if so Debtor is further advised that any such taxes constitute merely a claim provable in due course like other claims under Section 77 of the Bankruptcy Act.

Wherefore, Debtor prays that this Court enter an order instructing it whether it should prosecute its appeal before the State Board of Tax Appeals from the 1939 tax assessment and whether pending the filing and allowance of claims by creditors and a determination as to whether any valid tax levy exists against the Debtor for the year 1939 it should pay any part of the taxes so levied against it and if so what part.

The Central Railroad Company of New Jersey by Edward W. Scheer, President. Charles E. Miller, Attorney for Debtor.

[fol. 257] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In Proceedings for the Reorganization of a Railroad

No. 29,778

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

AFFIDAVIT IN SUPPORT OF PETITION FOR ORDER NO. 7

STATE OF NEW JERSEY,
County of Hudson, ss:

Frank M. Snyder, of full age, being duly sworn, upon his oath deposes and says:

1. That I am an officer, to-wit, the Comptroller of The Central Railroad Company of New Jersey, the Debtor herein, and as such have charge of its books and accounts, and have occupied that position since June, 1928.

2. The estimated liquid resources of the Company that will be available on December 31, 1939 are as follows:

Cash on hand December 9, 1939	$6,449,568	
During the remainder of December it is estimated that more will be received	3,244,416	
Making total cash available as of December 31, 1939		$9,693,984
[fol. 258] During the balance of December the estimated disbursements (excluding the sum of $570,000 for rent due the Lehigh Coal & Navigation Company) will be		3,327,322
Leaving on hand on December 31, 1939		$6,366,662
For purposes of operation of the railroad the normal working fund requirement is about		2,500,000
Leaving available for all other purposes		3,866,662
The present market value of all marketable securities held in the Company's Treasury on December 9, 1939 (not including $326,044 market value of securities in Insurance Reserve Fund)		3,230,796
Making the estimated liquid resources available on December 31, 1939		7,097,458

The Debtor is also obligated in respect of amounts remaining unpaid for property taxes assessed by the State of New Jersey for 1932 and subsequent years, as follows:

Year	Amount Assessed	Amount Paid	Balance Unpaid
1932	$4,148,774.18	$2,078,166.86	$2,070,607.32
1933	3,828,677.20	1,920,099.58	1,908,577.62
1934	3,899,987.75	2,343,578.97	1,556,408.78
1935	3,832,140.82	2,303,015.03	1,529,125.79
1936	3,741,897.06	2,099,544.79	1,642,352.27
1937	3,596,902.71	2,161,737.57	1,435,165.14
1938	3,782,111.73	2,273,266.79	1,508,844.94

On December 1, 1939 there will become due taxes assessed against Debtor by the State of New Jersey amounting to $3,415,922.05.

The Debtor has been contesting, in proceedings before the State Board of Tax Appeals and Courts of New Jersey and in the Federal Courts, its liability in respect of the amounts so assessed and remaining unpaid for said years. Appeals to the State Board of Tax Appeals of the State of New Jersey, the New Jersey Courts and the Federal Courts with respect to the taxes for the years 1932 and 1933 have resulted in the final denial of relief to the Debtor. In respect of the taxes so assessed for the years 1932 and 1933 Debtor is, therefore, subject to judgment for the unpaid taxes for said years amounting to $3,979,185 on which statutory penalties as of November 2, 1939 will amount to the [fol. 246] sum of $3,250,429, a total of $7,229,614 and to the sale of its property under such judgment. On October 20, 1939, the Attorney General of the State of New Jersey served notice on the Debtor that on November 2, 1939 pursuant to Section 54:28-1 and following sections of the New Jersey Revised Statutes, he would apply to the Honorable Thomas W. Trenchard, one of the Justices of the New Jersey Supreme Court, for an Order that the taxes for said years 1932 and 1933, together with the interest due thereon, and a reasonable sum to be certified by said Justice to be paid for the expense of the proceeding, be made a judgment of the New Jersey Supreme Court, and for a further Order that execution forthwith issue on said judgment directed to such Master of the Court of Chancery of New Jersey as shall be named by such Justice pursuant to the provisions

of Chapter 28 of Title 54 of the New Jersey Revised Statutes.

Decisions adverse to the Debtor in pending proceedings involving said unpaid balances of said assessments for 1934 and subsequent years may be handed down shortly; and such adverse decisions, upon becoming final, would immediately subject the Debtor to additional tax liabilities in the amounts of the unpaid balances for said years above stated, to-wit: $7,671,897, together with the statutory penalties thereon.

In addition to contesting the property taxes assessed by the State of New Jersey, as aforesaid, the Debtor has been contesting local assessments for some or all of said years, of which an aggregate of $4,065,953 has been paid and an aggregate of $2,339,173 remains unpaid, exclusive of statutory penalties. Efforts to persuade the Legislature of New Jersey to reduce Debtor's tax burden have to date been unsuccessful.

On October 18, 1939 the Debtor's cash on hand was $5,136,923 and unpaid drafts then in the hands of its Treasurer amounted to $314,142 leaving an available cash balance of $4,822,781. Debtor's cash receipts, October 19, [fol. 247] 1939 to October 31, 1939, both inclusive, are estimated at $2,070,982 and its cash requirements during said period (excluding amounts required to meet the obligations for interest, taxes and penalties above stated) are estimated at $2,033,970 resulting in estimated net cash receipts for this period of $37,012 and in an estimated cash balance on October 31, 1939 of $4,859,793. The minimum amount reasonably required as working capital for Debtor's current operations is $2,500,000. Thus, as of October 31, 1939, Debtor estimates it will have available cash in the sum of $2,359,793 with which to meet the aforementioned obligations for interest, past due taxes and penalties, and taxes becoming due December 1, 1939.

Debtor holds in its treasury, unencumbered, certain securities listed upon the New York Stock Exchange, or otherwise currently quoted, having an aggregate market value, at the close of business on October 18, 1939, of approximately $3,676,098 of which securities having a market value of $366,948 are held in Debtor's Insurance Reserve Fund. It also holds certain other securities of an aggregate par value of $8,730,557 not so listed or quoted

and having no presently ascertainable market value, and which have little or no value for purposes of sale or as collateral for loans. Certain of said securities are issued by component companies of Debtor's railroad system, or connections thereof, and could not be sold without impairing the integrity of said system, or its relations with such connections. Debtor is informed and believes and therefore alleges if it were forced to immediately dispose of its currently quoted securities it would obtain materially less in the aggregate than the total market value thereof as hereinabove set forth and that it will be impossible for it to secure any loan or loans of further funds upon its general credit or otherwise, save such amounts, if any, as might be borrowed solely upon the value, as pledged collateral, of the securities above mentioned; and that if any amount might be so borrowed, such amount, together with [fols. 248-249] Debtor's estimated cash resources, would be wholly insufficient to meet Debtor's financial requirements, so that the Debtor is without funds to continue to operate its system and property and maintain the same in condition and repair to render adequate service to the public and at the same time to meet its debts, including the aforesaid liabilities and obligations, as they mature, and the Debtor desires to effect a plan or reorganization pursuant to Section 205 of Title 11 of the United States Code relating to bankruptcy.

Third: A copy of this petition is this day being filed with the Interstate Commerce Commission.

Fourth: The filing of this petition by and on behalf of the Debtor was duly authorized by resolution of the Board of Directors of the Debtors adopted at a meeting thereof duly held on the 25th day of October, 1939.

Wherefore your petitioner prays that an order may be entered approving this petition as properly filed under said Section 205, and that it be granted all other and further relief to which it may be entitled.

The Central Railroad Company of New Jersey, by E. W. Scheer. Charles E. Miller, Attorney for Debtor.

I hereby certify that the foregoing is a True Copy of the original on file in my office. Benjamin F. Havens, Clerk, per Charles E. Jaeckel, Deputy. (Seal.)

[fol. 250] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

Order No. 3

ORDER

This matter coming on to be heard in the presence of Charles E. Miller, Counsel for the Debtor, and David T. Wilentz, Attorney General of the State of New Jersey, appearing *pro se*, and the Court having considered Debtor's duly verified Petition No. 2, and having heard the arguments of counsel, and having considered the same,

It is, on this 1st day of November, 1939, Ordered Adjudged and Decreed that the said David T. Wilentz, as Attorney General of the State of New Jersey, his successors, representatives and employees be, and they hereby are enjoined and restrained from continuing the proceeding instituted by said David T. Wilentz, as Attorney General of the State of New Jersey, for the entry of judgment in the New Jersey Supreme Court for taxes levied against the Debtor by the State of New Jersey for each of the years 1932 and 1933 and for interest thereon and for an order [fol. 251] that execution forthwith issue on said judgment and from entering any judgment or judgments in said proceedings and from entering any order for execution thereon against the Debtor and from commencing or continuing any other judicial proceeding to enforce any lien for said taxes upon the estate of the Debtor until after final decree shall have been entered herein, or until further order of this Court.

Guy L. Fake, United States District Judge.

[fol. 252] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In Proceedings for the Reorganization of a Railroad

No. 29,778

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

PETITION FOR ORDER NO. 7

Instructing Debtor Whether it Should Pay Any Part of the Taxes Assessed Against Its Property by the State of New Jersey for the Year 1939 and If So What Part

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

The Petition of the Central Railroad Company of New Jersey, the Debtor herein, respectively represents:

1. This Court by its Order No. 1 prohibited Debtor from making any payment on account of taxes, assessments or other governmental charges, State or local, due or to become due and whether heretofore or hereafter assessed upon its property or any thereof in the State of New Jersey without further order of this Court.

2. The taxes assessed by the State of New Jersey against property of the Debtor for the year 1932 aggre- [fol. 253] gated $4,148,774.18 and for the year 1933 $3,828,677.20. Contending that the taxes so assessed were excessive and unlawful Debtor appealed to the State Board of Tax Appeals of the State of New Jersey and the New Jersey courts from said assessments but was unable to obtain relief. It thereupon instituted actions in this Court to restrain the collection of the part of said taxes which it contended was excessive. In connection with said actions Debtor paid $2,078,166.86 to the State on account of the 1932 assessment and $1,920,099.58 on account of the 1933 assessment. Thereafter this Court handed down decisions denying such injunctions and the decision of this Court was affirmed by the Circuit Court of Appeals for the Third Circuit. Application was then made to the Supreme Court of the United States for a Writ of Certiorari to review

the decision of the Circuit Court of Appeals, but this application, as was also an application for a re-hearing thereon, was denied. (*Central Railroad of New Jersey* v. *Thayer Martin*, 19 F. Supp. 63, 82, 100 F. (2d) 139, 306 U. S. 669.)

3. On information and belief the amounts so assessed against Debtor's property for the years 1932 and 1933 are excessive and unlawful and this Court, under Section 104 of Title 11 of the U. S. Code will have to determine the amount and legality thereof.

4. For the years 1934, 1935 and 1936, the State of New Jersey assessed taxes against Debtor's property as follows:

1934	$3,899,987.75
1935	3,832,140.82
1936	3,741,897.06

Thereafter, Debtor paid the following amounts on account of the taxes so assessed against its property:

[fol. 254]

1934	$2,343,578.97
1935	2,303,015.03
1936	2,099,544.79

An action was thereupon instituted in this Court to restrain the State from collecting the balance of the taxes so assessed for said years. By an opinion filed November 1, 1939 Judge Forman held that the amounts so assessed for said years 1934, 1935 and 1936 were excessive and that an injunction should issue to restrain the collection of any further taxes until such time as the taxing authorities of New Jersey re-value the property of Debtor in accordance with the principles laid down by Judge Forman in his opinion. No such re-assessment has as yet been made.

5. For the years 1937 and 1938 the taxes assessed by the State of New Jersey on Debtor's property were as follows:

1937	$3,596,902.71
1938	3,782,111.73

3. The tax claims of the State of New Jersey and its municipalities are as follows:

The amount of State Taxes claimed by New Jersey for the years 1932 and 1933 (not including penalties or interest)	$3,979,184	
The amount of State taxes claimed by New Jersey for the years 1934 to 1938, inclusive (not including penalties or interest)	7,671,896	
The amount of State taxes claimed by New Jersey for 1939	3,415,922	
Total tax claims of the State of New Jersey		$15,067,002
The amount of claims of New Jersey Municipalities for local taxes for the years 1932 to 1939 incl. total	2,612,207	
Total taxes claimed by the State of New Jersey and its Municipalities (not including penalties or interest)		$17,679,209

[fol. 259] It will therefore be seen that the tax claims asserted by the State and Municipalities in New Jersey, not including any penalties or interest, amount to approximately two and one-half times all of the cash that will be on hand on December 31st, plus the market value of all marketable securities in the Company's treasury. (Except $326,044 market value of securities in Insurance Reserve Fund.)

Frank M. Snyder, Comptroller, The Central Railroad Company of New Jersey.

Sworn to and subscribed before me this 12th day of December, 1939. Roy Bolles, Notary Public of New Jersey. My Commission expires March 28, 1943. (Seal.)

[fol. 260] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In Proceedings for the Reorganization of a Railroad

No. 29,778

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

Order No. 7

To Show Cause Why an Order Should Not be Entered Instructing Debtor Whether it Should Pay Any Part of the Taxes Assessed Against it by the State of New Jersey for the Year 1939 and If So What Part

Upon consideration of the Petition filed by the Debtor herein praying that an Order be entered instructing it as to whether it should pay any part of the taxes assessed against it by the State of New Jersey for the year 1939 and if so what part;

It is on this 7th day of December, 1939, Ordered, that David T. Wilentz, Attorney General for the State of New Jersey, William I. Woodcock, Jr., Counsel for the Reading Company, Fred N. Oliver, Counsel for certain Institutional Bondholders, Milton G. Shoenholz, Messrs. Greenbaum, Wolff & Ernst and William A. Roberts, Counsel for certain bondholders, Colie & Schenck and Larkin, Rathbone & Perry, Esqs., Counsel for Central Hanover Bank and Trust Company, Messrs. Martin & Reilly, Samuel [fol. 261] D. Matlack and Messrs. Milbank, Tweed, Hope & Webb, Counsel for the Lehigh Coal and Navigation Company and Messrs. McCarter & English, counsel for certain bondholders, show cause before this Court at the United States Court House at Newark, N. J., at 10:30 A. M. on December 13th, 1939, why an order should not be entered herein instructing the Debtor whether it should pay any part of the taxes assessed against it by the State of New Jersey for the year 1939 and if so what part.

Proper cause being shown therefor, service of a copy of this Order and of the aforesaid Petition, certified by counsel for the Debtor, shall be made by depositing a copy of said petition and order, enclosed in a duly stamped

envelope addressed to each of the persons hereinabove named, in the United States Mail on or before December 8th, 1939.

Guy L. Fake, United States District Judge.

[fol. 262] UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

In Proceedings for the Reorganization of a Railroad

No. 29,778

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

MINUTES OF HEARING

On order No. 7 to show cause why an order should not be entered instructing Debtor whether it should pay any part of the taxes assessed against it by the State of New Jersey for the year 1939 and if so what part.

Newark, N. J., Wednesday, December 13, 1939.

Before Hon. Guy L. Fake, U. S. D. J.

APPEARANCES:

Charles E. Miller, Esq., Alexander H. Elder, Esq., and Donald R. Creighton, Esq., for Debtor.

John J. Solan, Esq., Assistant to the Attorney General, for the State of New Jersey.

Major Fred N. Oliver, for certain institutional bondholders.

Messrs. Greenbaum, Wolff & Ernst, by Justin N. Reinhardt, Esq., and Messrs. Roberts & McInnis, by Edgar Turlington, Esq., for a bondholders' protective committee. [fol. 263] Messrs. Colie & Schenck, by Alexander T. Schenck, Esq., and Messrs. Larkin, Rathbone & Perry, by Hovey C. Clark, Esq., for the Central Hanover Bank & Trust Company, Trustee.

Messrs. Martin & Reiley, by Blair Reiley, Esq., and Messrs. Milbank, Tweed, Hope & Webb, by William M. Evarts, Esq., for The Lehigh Coal and Navigation Company.

The Clerk: In the matter of the Central Railroad of New Jersey, on an order to show cause why an order should not be entered instructing Debtor whether it should pay any part of the taxes assessed against it by the State of New Jersey for the year 1939 and if so what part.

Mr. Miller: If your Honor pleases, I have two gentlemen I would like to introduce to the Court: Mr. Alexander H. Elder, of the Massachusetts and the District of Columbia Bar, and Mr. Edgar Turlington, of the Bar of the District of Columbia.

The Court: Very glad to meet you, gentlemen; and you may upon this introduction speak in the cause.

Mr. Miller: If your Honor pleases, the matter comes on this morning pursuant to a petition filed in the cause and a rule to show cause.

Now, as the Clerk said, the petition is for instructions to the Debtor whether it should pay any part of the taxes assessed against its property by the State of New Jersey for the year 1939, and if so, what part. The petition in brief——

The Court: Who is making the application?

Mr. Miller: The Debtor made the application.

The Court: I beg pardon?

Mr. Miller: The Debtor made the application.

The Court: The Debtor is making the application to the Court.

Mr. Miller: For instructions.

[fol. 264] The Court: For instructions. And upon what is that based?

Mr. Miller: On this: During the period between the filing of the petition and the confirmation of the Trustees, the officers of the Debtor are to carry on the business pursuant to the orders of the Court. We are coming in because I understand the authorities of the State of New Jersey felt that the Debtor——

The Court: Have they made an application?

Mr. Miller: No, no formal application. The only application is the application of the Debtor, for instructions. And I point out at the beginning that this application for instructions only relates to the taxes assessed by the State of New Jersey for the year 1939. There is no other tax before the Court.

Now, the petition in brief points out that by your Order No. 1 you directed——

The Court: Let me have a copy of the petition, please.

Mr. Miller: This is a copy of the petition for Order No. 7 (handing document to the Court). I will have to go back and get my copy now. I have got one right here.

The petition points out that by your Order No. 1 you directed the payment of taxes other than taxes due the State of New Jersey——

The Court: I didn't get that.

Mr. Miller: The petition that is before you today points out, recites, that by your Order No. 1—that is, approving the petition—you directed that taxes should be paid other than taxes due the State of New Jersey. The petition sets out that for the years 1932 and 1933 the Debtor paid 60 percent of the taxes assessed against it by the State of New Jersey and litigated the balance; and it still contends that that balance is unlawful and excessive. And of course your Honor remembers that under Section 64 of the act as amended in 1938, if any question with regard to taxes arises it is the duty of this Court to pass upon the question.

[fol. 265] Now, the petition further sets out that with respect to the taxes for '34, '35, and '36, the Debtor again paid 60 percent of the taxes assessed by the State of New Jersey and instituted an action in this court which resulted in a decision handed down December 1 by Judge Forman, holding that the taxes assessed for those years by the State were on an unlawful basis, and enjoining or directing the enjoining of the unpaid balance until there is a reassessment in accordance with the directions of that decision.

The petition sets out that for the years 1937 and 1938 it has also paid 60 percent of the taxes assessed by the State and that appeals from the assessments made by the State are pending before the State Board of Tax Appeals of the State of New Jersey.

It sets out that some three million odd dollars were assessed for 1939, and also that there is a proceeding pending before the State Board of Tax Appeals with respect to the legality of that assessment; the petition asserting that the assessment for 1939 is again illegal and excessive, and an assessment made contrary to the provisions of the decision of Judge Forman.

Now, assuming that one of the most important things that your Honor will have to consider is the financial status of this Debtor, because after all your ultimate ob-

ligation in this proceeding is to work out a plan for a reorganization, I have had prepared and submit herewith an affidavit. I served it on some of my associates who are here, in accordance with the notice. If anybody else wants a copy they may have it. This affidavit sets forth the following:

"Frank M. Snyder, of full age, being duly sworn, upon his oath deposes and says:

"1. That I am an officer, to-wit, the Comptroller of The Central Railroad Company of New Jersey, the [fol. 266] Debtor herein, and as such have charge of its books and accounts, and have occupied that position since June, 1928.

"2. The estimated liquid resources of the Company that will be available on December 31, 1939 are as follows:

Cash on hand December 9, 1939		$6,449,568
During the remainder of December it is estimated that more will be received.	3,244,416	
Making total cash available as of December 31, 1939		$9,693,984
During the balance of December the estimated disbursements (excluding the sum of $570,000 for rent due the Lehigh Coal & Navigation Company) will be	3,327,322	
Leaving on hand December 31, 1939		$6,366,662"

The affidavit sets forth that for working funds two million and a half are required, leaving available for all other purposes $3,866,662.

The affidavit sets forth that in addition the market value of the marketable securities of the Debtor amount to $3,230,796, making the estimated liquid resources available for all purposes on December 31, 1939, $7,097,458.

Now, one of the things that we are confronted with out of that is taxes, which are set out here, for the years '32 and '33, '34 to '38, and '39; total tax claims of the State of New Jersey, $15,067,002, and $2,612,207 of munici-

palities; making total tax claims, State and municipal, $17,679,209.

In other words, the financial situation is this: We have seven million dollars of available liquid resources. That includes cash and securities. And against that we are confronted with possible tax claims of seventeen million dollars.

[fol. 267] Now, of course, the significance of that seems to me to be this: that no payment of any kind of any amount can be made that is going to cripple the operation of this property in the public interest.

Now, if we were operating the railroad ourselves, if we hadn't filed a petition, it is probable that we might have made, would have made, a payment on account of the taxes for the year 1939; but inasmuch as a petition has been filed and the property is now in the hands of this Court, I think there are some legal reasons that your Honor must consider as to whether you have the power to order any payment to be made.

Now, as I understand the fact, the inception of this particular proceeding arose from the fact that the Government of the State of New Jersey felt that a part at least of this tax should be paid. The distinguished assistant of the distinguished Attorney General is here, Mr. Solan, and I would like to yield to him for the purpose of having him advise your Honor of the reasons he thinks make it legal for your Honor to direct us to make any payment at this time.

Mr. Solan: If the Court please, I appear on behalf of the Attorney General in response to the rule, and we seek from your Honor an order that the Debtor pay out of the funds in hand, the assets, the estate of this Debtor, at least 60 percentum of the taxes levied against the property for the year 1939.

The facts with respect to our statute and with respect to the situation of the tax are briefly these: Our statute provides for the tax on this railroad property, the custody, operation and control of which is now under your Honor's order. The tax was assessed in 1939, actually fixed about the middle of the year, and is payable any time up till December 1, 1939, a month after this Court took the property over. The——

The Court: When does the tax become a lien under the State law?

[fol. 268] Mr. Solan: The tax became a lien——

Mr. Miller: Would it bother counsel if I answered the question of the Court?

Mr. Solan: Pardon?

Mr. Miller: Would it bother you if I answered his Honor's question?

Mr. Solan: No, no.

Mr. Miller: The 1st of June under the statute. I have a little memorandum of that.

The Court: Does it become a lien on that date?

Mr. Miller: Yes.

Mr. Solan: I agree.

The Court: I beg pardon?

Mr. Sloan: I agree, your Honor.

The Court: Does it become a lien on that date?

Mr. Miller: The statute says so. I have a little memorandum of that on a slip of paper.

The Court: What does the statute say? I was wondering whether or not it became a lien on that date or became a lien on December 1.

Mr. Miller: No, on June 1. There is a memorandum of the statute (handing memorandum to the Court).

The Court: Well, when does it commence to draw interest?

Mr. Miller: December 1. It becomes due and becomes a lien on June 1, draws interest on December 1. But under Anderson case in 203 United States it was held that a New Jersey tax, due on June 1, drawing interest from December 1, becomes due on June 1.

Mr. Solan: Your Honor, I have here an excerpt from the statute:

"These taxes shall be a lien paramount to all other liens upon the land and tangible property and franchises of the company in this State. The lien shall take effect on June 1 of the year in which the tax is payable.

[fol. 269] And the tax is payable any time between—we always think of it as payable on December 1 because it is on that day and not until that day that it begins to bear interest if not paid.

There is another section of the statute which permits the Attorney General ten days after it is due—that would be December 10, it not being paid—to apply for a summary judgment and execution to realize on the judgment for the amount of the tax unpaid. That proceeding, of

course, has not been permitted as a result of this proceeding.

The taxes for the calendar year, two months of which, of course, this Debtor will be in custody of the property—he is in custody of the property on the day on which the tax begins to bear interest and——

The Court: Who is in custody?

Mr. Solan: The Debtor is in the custody——

The Court: Yes.

Mr. Solan: Of this Court. The Debtor is in custody under the order of this Court.

The tax is not apportionable. It is fixed in the entire amount, a fixed sum. It can't be apportioned. And it bears interest from December 1, and is subject to summary judgment and execution to realize on it December 10. Of course, if no order is made, this tax will bear interest from that time, from December 1. That is the situation.

This, of course, is a property tax, not a franchise tax, like the Anderson tax. The Debtor under the situation here is, of course, in the custody of the property when the tax becomes payable. It is payable every day during the time that he is in the custody, during this year. We, of course, claim that the Anderson case is not appropriate. We claim under another section of the Federal statute this tax may rightly be ordered paid, other than the Bankruptcy Act.

[fol. 270] Now, the situation is that this litigation concerning these taxes has been in effect since the beginning of 1932. The controversy has been with respect to the valuation, nothing else; the valuation. In other words, the company each year has claimed that the valuation was too high, and therefore they have protested only against a part of the tax, not the tax as a whole; and that part of the tax, I think, will be conceded to be 40 percent. Because the facts are that the company has voluntarily paid and thereby conceded 60 percent of the levy each year from 1932 during all this litigation; and therefore we have a controversy respecting only 40 percent of this tax. And we are not asking the Court now to make any order respecting that part of the tax. We are asking the Court to make an order respecting that part of the tax which has not been in litigation; and as——

The Court: Well, is it divisible?

Mr. Solan: Pardon?

The Court: Is it divisible? Hasn't the District Court at Trenton, Judge Forman, ruled that the entire levy is invalid and that there must be a reassessment upon the principles laid down in that opinion?

Mr. Solan: I don't so understand, your Honor. The facts are in that case that Judge Forman has not yet made his findings of fact or his determinations of law, and has not yet made his decree. He has, of course, in an opinion made certain assertions with respect to the matter, but we think that the matter will be controlled by his findings and by the decree. The effect of Judge Forman's opinion if applied literally would be that we would be restrained from collecting 40 percent of the tax. Because at the initiation of the cause——

The Court: Has he so held?

Mr. Solan: At the initiation of the cause, your Honor, he ordered 60 percent of the taxes paid. That has been paid. He does not attempt to make any effort to have that [fol. 271] repaid; and it is conceded by everybody to be due. It is not really in question. So the decree——

The Court: One of the questions in my mind at the moment is whether or not there is now a valid levy for the year 1939.

Mr. Solan: Your Honor, there isn't any question about that. There is a levy. I think the Court will take judicial notice of the fact that this property is in the State of New Jersey and was on the tax day, and that it was in the use of this company. There is no real question about that. I do not think the gentlemen here will dispute that fact. And they are, of course, in possession of it. And this property on which this tax was imposed was in railroad use. I have a copy here of the tax act, providing that all property in this State in railroad use should annually be taxed. So there is no real question, as I understand it, that this property is subject to tax and that a levy thereon has been made, but the issue is with respect to the amount of tax that may be exacted, and that arises out of the valuation placed on the property. And in that connection I have and should like to offer a short affidavit from the State Tax Commissioner, with the intent of showing that for the year 1939, as contrasted with the other years, from '36

on to '39, the valuation of the property has been reduced each year, and has been reduced to the lowest extent in 1939. In other words, as this affidavit shows, in 1938 the property was valued for taxation at $81,877,379, and in 1939 it is seventy-two million—practically ten million less.

The point I wish to make and draw from that is that there should be really less complaint this year than there was in the preceding years due to the fact that we are exacting a smaller amount of taxes, due to the fact that we have lowered the valuation of the property.

And that is the situation. In all this litigation during this last eight years, the question involved has been the [fol. 272] legality of substantially that 40 per cent. And that is the reason why we feel justified in coming here and asking that your Honor do what without a doubt the company would have done had it not had resort to this proceeding, and that is on December 1 make a part payment of this tax.

I can't impress on your Honor how necessary it is that this be paid, how necessary to the municipalities and to the State, for the reason that there has been, as the record shows, as this petition shows, a substantial withholding of what is deemed to be the true tax for eight years. So that it is absolutely necessary to carry on that these municipalities get at least a portion of the tax, and in equity they are certainly entitled to that portion not in dispute.

Now, dealing with the question of the——

The Court: Upon what theory does this Court have the power, upon the filing of the petition and before the confirmation of Trustees?

Mr. Solan: Your Honor, that is a point that I would like to discuss now. I believe that you have the power. I believe that upon the invoking of the jurisdiction of this Court under Section 77, this property came under the control of this Court, and the only difference that arises between this and the ordinary case is that in this case instead of qualified trustees being your agents in the carrying out of the duties imposed on you under the act, the corporation itself, the Debtor itself, occupies that position; and I think it is very clear that the statute contemplated that.

I am reading a portion of Section 77(a) and in part paragraph (2) of Section 77 (c). The first, the pertinent part, it seems to me, says:

"If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, [fol. 273] have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Section 77(c), which should be read in connection with that for this particular point, it seems to me, says:

"Prior to the appointment"——

The Court: Just a moment. Where?

Mr. Solan: Paragraph (2) of Section 77 (c).

The Court: Paragraph (2)?

Mr. Solan: Section 77 (c).

The Court: Yes. What part are you reading there?

Mr. Solan: "Prior to the appointment of a trustee"——

The Court: Yes.

Mr. Solan: "Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms and conditions as he may from time to time impose and prescribe."

We feel that a consideration of the history of this legislation bears out the contention that until the qualification and formal qualification of the trustees, it was the intention of the Congress that your Honor should operate this property through the Debtor.

The Court: Are you taking your basis from the historical note that I find here to the act?

Mr. Solan: I am not—I confess I haven't seen the note, your Honor.

The Court: All right. Proceed.

Mr. Solan: It is an attempt on my part to point out that the '33 act provided for the appointment of a temporary

[fol. 274] trustee or trustees pending the confirmation, and that this act eliminates that section, and this act does not indeed provide for the appointment of any temporary trustee.

I have examined some of the authorities on the subject and I have a statement written by Henry J. Friendly, which appeared in the Columbia Law Review, 36 Columbia Law Review, 27, in which he in part says:

"The most important of the administrative changes are those relating to the appointment of trustees. Under the original act such appointment was discretionary; under the amendment, it is mandatory. Under the original act trustees were required to be chosen from a panel 'selected and designated in advance' by the Commission;" —the I. C. C. "the amendment abolishes the panel and substitutes a requirement of 'ratification' by the Commission. The provisions of the original act for a temporary trustee or trustees are omitted; instead the debtor operates the property until the appointment of trustees, after a hearing on notice, and the ratification of such appointment by the Commission."

And in a footnote at page 40 of this article I find this statement, in which the author seems to indicate the reason for the change in the '35 act allowing the debtor to continue to operate the property until the confirmation. He says:

"This change was said to be necessary because under the present system, he (the judge) can put in a temporary trustee and get him going before he has the hearing and, of course, it is harder to oust a man when he is in, than to keep him from being appointed originally."

It is also, it seems to me, apparent that there had to be somebody to act for your Honor in the conduct of the business during this interval.

The Court: Well, of course, the Debtor is permitted to continue the operation of the business.

[fol. 275] Mr. Solan: Yes; and our understanding is——

The Court: Under the section of the statute that you read a moment before.

Mr. Solan: Yes; and our understanding is that he is to continue, and that the mere fact that there is a delay in the confirmation of the trustees is not to prevent your

Honor from carrying on any functions that he may ordinarily have. In other words, they are to take the place during the interval, the debtor——

The Court: The question then is whether or not these taxes may be considered as operating expenses. Isn't that it?

Mr. Solan: There may be some question about that raised. I don't think there is. I frankly don't think there is because——

The Court: Well, do you say the taxes are part of the operating expense, or are they not?

Mr. Solan: I say that they are really part of the operating expense. The point is this: Here is property which this company is using. Now, of course, it is the law of the land that anybody who uses property——

The Court: How does the railroad set up its books with relation to taxes? Does it set them up as part of the operating expense, in their accounting work?

Mr. Solan: I am sure, your Honor, I don't know.

The Court: Can any one state that to me? Can any one here give me any information on that?

Mr. Elder: Your Honor, if I may answer the question, the accounting is governed by the rules of the Interstate Commerce Commission, and taxes are not under operating expenses but under a separate account known as Railway Taxes Accruals. That's an entirely distinct item from operating expenses.

The Court: And the books are kept that way under the direction of the Interstate Commerce Commission, is that correct?

[fol. 276] Mr. Elder: That's correct, yes, sir.

Mr. Solan: Your Honor, we feel that under the Federal statutes the debtor is required to pay the taxes to the State. The statutes we rely on are the Section 64 (a) of the National Bankruptcy Act, which is the provision in the act, the old act, as you will recall, which requires trustees to pay taxes. The question has been bruited as to whether that is applicable to proceedings under 77.

The Court: Well, there is a reference to it here, isn't there?

Mr. Solan: I have succeeded in finding a couple of cases involving——

The Court: Well, isn't there a reference in 77 to the general Bankruptcy Act,——

Mr. Solan: I don't think so.

The Court: —which provides that where not otherwise to the contrary required, the Bankruptcy Act applies?

Mr. Miller: Yes, sir, there is.

The Court: Where is that? Let me have it.

Mr. Miller: I will find it for you and give it to you in a minute.

Mr. Solan: I find, your Honor, two cases, which I have cited here in a memorandum which I will be glad to hand up, involving proceedings under the Railroad Act, Section 77, in which the Court felt that Section 64 (a) was applicable and justified the Court in paying the taxes. Those are the cases involving the New York, Ontario & Western and one involving the Denver and Rio Grande and——

The Court: But the issue there, I suppose, arose after the trustee's confirmation.

Mr. Solan: I think I might say that most of these cases perhaps that I have cited arose after the trustees had qualified, but if my initial contention is correct it doesn't really make any difference, because I feel that this Debtor stands in and performs the same function today——

[fol. 277] The Court: As the receiver.

Mr. Solan: —as the trustee, when qualified.

The Court: As though he were a temporary receiver.

Mr. Solan: Yes. And the theory is, if your Honor will bear with me on that point, that it is very distinct, the idea of Congress, that this property should at all times be operated, there should be no let-up in it; and therefore we must concede that Congress when it made this provision had in mind that dealing with the Interstate Commerce Commission there might ensue a delay in the qualification and approval of trustees, and therefore it provided this way, and made no provisions for any temporary trustee nor temporary receiver; and if the purpose of the act is to be carried out, that is if business is to be carried on during this interval, it must be on the theory that the Court operates through the medium of the Debtor. And for that reason these cases, even though they do involve cases where the trustees were in court and were seeking to prevent payment, are nevertheless applicable.

In the Denver case the Court says:

"As already pointed out, Section 77 is bankruptcy; an integral part of the act, made so by its very provisions.

We fail to find anything inconsistent with the application we have made."

The Court went on to say:

"No court can countenance without compelling cause the nonpayment of taxes legally owing by debtors under its exclusive jurisdiction, especially where, as here, the debtor is the largest taxpayer in the state. Any delay is a serious matter to the states, counties and school districts, directly impairing their functions."

But aside from relying on that section of the act of Congress, 64 (a) of the Bankruptcy Act, we find we are able to rely on Section 124 (a) of the Judiciary Act, which is usually referred to as the 1934 act, and which reads:

"Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court [fol. 278] and as authorized by said court to conduct any business, shall from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: Provided, however, that nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

And with respect to that we are very fortunate in being able to say to your Honor that the United States Supreme Court in a case decided within the last two weeks has upheld not a tax but a penalty on a tax under this Section 124 (a) of the Judiciary Code. The case is Boteler *v.* Ingels, and it was decided November 6, 1939. It involved a case where the laws of California required operators of motor vehicles to obtain a license and pay a fee, and this trustee of the bankrupt estate, being in possession on the day on which the license should be obtained, neglected to do it and resisted the payment of the penalty which was imposed, and the Court unanimously, the Supreme Court of the United States, upheld the claim of the State that the penalty itself should be imposed and could be collected.

The Court says:

"We need not determine whether without legislation such as the 1934 Act a trustee in bankruptcy conducting a business shall be subject to all State and local taxes."

And they go on and hold that that act is sufficient. That bankrupt was under 77B, which is not dissimilar in this respect; and the Court has there held that under that '34 section it becomes the duty of the trustees under 77B to pay State taxes.

Now,——

[fol. 279] The Court: And are they a prior lien to the lien of the bondholders?

Mr. Solan: This was a lien—in this particular case it was; the State had a lien on the vehicle, I believe.

Your Honor, on that point I would like to make clear that our statute provides that this claim for taxes shall be a paramount lien, and therefore in the ranking of it, in the classification of this, this claim necessarily comes high. So that it doesn't seem to me that there should be any great difficulty on that point. The exact language of our st*t*aute which is——

The Court: Well, I assume you have set that forth fully in your brief.

Mr. Solan: Yes, sir, I have set it forth.

Therefore I feel that any fair construction of this act justifies your Honor at this stage and grants your Honor at this stage power to make such an order as we apply for. I feel that the act of Congress really permits the trustee, or whoever stands in his shoes for the time being, to pay and puts him under a duty to pay these taxes.

Now, this tax is a tax on property, and I think that that ought to be very greatly borne in mind, because there are some cases which involve taxes on franchises or privileges which the trustee, of course, after the adjudication, the trustee or receiver, whoever he happens to be, may not use, and for that reason there is no claim, no just claim, that he should pay out of the property in his hands any tax for any period subsequent to the adjudication. That is, New Jersey *v.* Anderson dealt with our capital stock tax. But this is a property tax, and this property is now in control of the debtor. He is using it every day in the operation of his road. He couldn't operate his road without it. It is one of the obligations incident to taking it over. He can't take

the property over under any stretch of the imagination without meeting the obligations of the State. Surely, the Congress never meant, never in the world meant, by giving [fol. 280] these railroads the opportunity to reorganize under this Bankruptcy Act, that they should be relieved from their duties to pay property taxes. And those property taxes are now due, and if it were not for this Court we would be able to realize on them. Of course, in ordinary bankruptcy cases it is not unusual for the Court to direct the payment of rent while the receiver is operating the business and before the election of trustees.

The Court: Could this tax be considered upon the same basis as rent, do you suppose? Or does rent fall in a different classification under the Bankruptcy Act?

Mr. Solan: Your Honor, I believe it is under the same general obligation. It is the——

The Court: Now, under your tax levy you would have a right to take possession were it not for the injunction,——

Mr. Solan: Yes.

The Court: —which the filing of the petition here carries with it.

Mr. Solan: Yes, your Honor.

The Court: You would have a right to take possession of the road.

Mr. Solan: We would have a right to realize on our tax, to realize on the property on which we——

The Court: Well, that would require a public sale, before you could take possession of it.

Mr. Solan: Yes, the scheme is—the statute provides a very summary proceeding. We just go before a Justice of the Supreme Court with a certification of the Comptroller as to the amount due, and on that mere certification he gives us a summary judgment, and then he issues an execution to realize on that judgment. So that we have a quick, speedy remedy; and of course that's interfered with by this proceeding.

I have a leading case on this question of property taxes—it is in 194 U. S. But its principles are just as applicable. [fol. 281] It is a case which involved the validity of taxes imposed on property in the hands of a trustee in bankruptcy, and the Supreme Court there had occasion to comment on the intent of the Congress in the exercise of its

bankruptcy power with respect to public dues and taxes against property of the bankrupt, and it said in part:

"By Section 7 of that act the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the state and municipality or which should exempt it from its obligations to either. If Congress has the power to declare otherwise, and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."

I have another case here which I won't read. In Thompson *v.* Louisiana, I found a case which involved the right of the Missouri-Pacific Railroad, a corporation of Missouri, to do business or to continue to do business in Louisiana, under a tax against foreign corporations for doing business. That was a franchise tax. And there the Court held that under Section 124 (a) Title 28 of the United States Code Annotated, any receiver, liquidator and so on shall pay; that the receiver of the Missouri-Pacific was duty bound to pay the Louisiana tax.

Your Honor, I want to say as vigorously as I can that this is a very serious question from the viewpoint of the State and its agencies. As I have, I think, stated before, there has been a withholding of a substantial portion of what we consider to be a part of this tax for eight years.

The Court: Well, just how serious is it, if you know?

Mr. Solan: How serious?

[fol. 282] The Court: The withholding of this tax.

Mr. Solan: Your Honor, I can state it, if you will permit me. I have seen an affidavit of Mr. Greer, the Comptroller of Jersey City—if I may state the contents.

The Court: Yes.

Mr. Solan: He states that some years ago, and Jersey City is vitally interested in this particular tax—he states in his affidavit that some years ago the City of Jersey City found that in order to carry on its municipal activities it needed at least 80 percent of this levy from these railroads, and with legislative sanction it got power to use municipal credit to borrow the difference between the 60 percent which

the railroads were paying and the 80 percent which it required. And therefore it is very vital, because Jersey City is not only absorbing in carrying on its functions 60 percent which has been paid but it has been during these years since '35 borrowing 20 pc. ent of the levy. That's how serious it is. And Mr. Greer goes on to say that if——

The Court: Well, is that affidavit here?

Mr. Solan: No, your Honor. It was in another proceeding.

The Court: Well, why wouldn't it be material here?

Mr. Solan: I would be very glad to file it with your Honor.

The Court: Are there any other cities that are in the same position?

Mr. Solan: I can't speak with respect to whether or not the other cities along the Central line are borrowing in anticipation of this money, but I do know, of course, that they are being deprived of this 60 percent, and I am quite sure——

The Court: Isn't most of this levy under the State statute allocated to public school purposes?

Mr. Solan: I can't state the figures but what is known as the first-class tax, that's on the main stem, is allocated [fol. 283] to the General State fund to a small extent, then to certain State institutions, and then whatever is left to general local school purposes. The second, third, and fourth class taxes, the proceeds of those classes, go to the municipalities in which the railroad has its property.

The Court: That is what is called second class?

Mr. Solan: Second, third, and fourth, yes.

The Court: What are the third and fourth classes? I am not familiar with them.

Mr. Solan: The second class——

The Court: Well, the first class is the main stem.

Mr. Solan: It is the main stem, excepting structures.

Mr. Miller: A hundred feet.

Mr. Solan: A hundred feet, the main line; with the exception of not including structures.

The Court: Now, the structures are second class?

Mr. Miller: The second class is the remaining used property. The third class is personal property, and the fourth class is the remaining property, including the franchise.

The Court: All right. Proceed.

Mr. Solan: Your Honor, I have undertaken to make clear the necessity and the meritorious claim we have for this

relief. We do not feel that we are asking for anything that is unfair, because it is something that has during all this turmoil and all this litigation been voluntarily paid. And the company has the funds. It would have doubtless paid them had this litigation not ensued. We are convinced that your Honor has the power, and we feel that the power should be exercised under all the equities and in all fairness and justice. And the failure to exercise the power even for a short time would be a very serious matter, because we are not only obliged to receive this tax but we are obliged under the way in which public affairs are carried on to receive this tax when due. The provisions are made for its payment and [fols. 284-319] for its expenditure when it is payable; and therefore any delay of any kind whatsoever will without doubt cripple the municipalities.

[fol. 320] In the District Court of the United States for the District of New Jersey

In the Matter of The Central Railroad Company of New Jersey, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Order No. 11 Directing Debtor to Pay $2,049,553.23 on Account of Taxes Assessed Against Its Property by the State of New Jersey for the Year 1939.

The Debtor having filed its petition praying for instructions whether it should pay any part of the taxes assessed against its property by the State of New Jersey for the year 1939, and if so what part, and the matter coming on to be heard in the presence of

Charles E. Miller, Esq., Alexander H. Elder, Esq., and Donald R. Creighton, Esq., for Debtor.

John J. Solan, Esq., Assistant to the Attorney General, for the State of New Jersey.

Major Fred N. Oliver, for certain institutional bondholders.

Messrs. Greenbaum, Wolff & Ernst, by Justin N. Reinhardt, Esq., and Messrs. Roberts & McInnis,

by Edgar Turlington, Esq., for a bondholders' protective committee.

[fol. 321] Messrs. Colie & Schenck, by Alexander T. Schenck, Esq., and Messrs. Larkin, Rathbone & Perry, by Hovey C. Clark, Esq., for the Central Hanover Bank & Trust Company, Trustee.

Messrs. Martin & Reiley, by Blair Reiley, Esq., and Messrs. Milbank, Tweed & Hope, by William M. Evarts, Esq., for The Lehigh Coal and Navigation Company,

and the Court having considered the matter and having this day filed its decision directing the payment of the sum of $2,049,553.23, on account of the taxes assessed against Debtor's property by the State of New Jersey for the year 1939,

It is, on this 26 day of December, 1939 Ordered that the Debtor pay to the State of New Jersey the sum of $2,049,553.23 on account of the taxes claimed to have been assessed against its property by the State of New Jersey for the year 1939,

And, it is further Ordered that if the State of New Jersey shall file claim for the taxes assessed by it against the property of the Debtor for the year 1939, and such claim as finally allowed shall be less than the sum herein directed to be paid, any such excess shall be credited against any taxes hereafter assessed against said property. In the event that no claim is filed or allowed for such taxes, then the entire amount herein directed to be paid shall be credited against any taxes hereafter assessed against the said property by the State of New Jersey.

Nothing herein contained shall be so construed as to be a decision of the issues which may be involved as to the validity of the assessment or as to the amount or legality of the taxes. No interest or penalties shall accrue on the amount herein directed to be paid for any period of time after payment thereof.

Guy L. Fake, United States District Court Judge.

[fol. 322] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29778

PETITION FOR ORDER No. 53 AUTHORIZING THE TRUSTEES TO PAY MONTHLY INSTALLMENTS ON ACCOUNT OF TAXES ASSESSED AGAINST PROPERTY OF THE DEBTOR BY THE STATE OF NEW JERSEY FOR THE YEARS 1932 AND 1933

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

Shelton Pitney and Walter P. Gardner, Trustees of the property of the Debtor, respectfully represent:

1. This Court, by Order No. 1 entered in this cause, prohibited the Debtor from making any payment on account of taxes, assessments or other governmental charges, state or local, due or to become due, and whether theretofore or thereafter assessed upon the property of the Debtor or any thereof in the State of New Jersey without further order of this Court.

2. The taxes assessed by the State of New Jersey against property of the Debtor for the year 1932 aggregated [fol. 323] $4,148,774.18, of which the Debtor promptly paid $2,078,166.86, and for the year 1933 the taxes so assessed aggregated $3,828,677.20, of which the Debtor promptly paid $1,920,099.58. Believing that the taxes as assessed for each of said years were excessive and unlawful, the Debtor appealed from said assessments to the State Board of Tax Appeals of the State of New Jersey, and in the case of the 1933 taxes to the New Jersey Supreme Court, but the debtor was unable to obtain relief by said proceedings. Thereupon, the Debtor instituted actions in this Court to restrain the collection of the parts of said taxes which it contended were excessive. Thereafter, this Court, without hearing oral testimony, handed down decisions denying injunctive relief, and the decisions of this Court were affirmed by the Circuit Court of Appeals for the

Third Circuit. Application was then made to the Supreme Court of the United States for a writ of certiorari to review the decisions of the Circuit Court of Appeals, but said application was denied and an application for a rehearing was also denied. (*The Central Railroad Company of New Jersey* v. *J. H. Th[illegible]artin*, 19 Fed. Supp. 63, 82; 100 Fed. (2d) 139; 306 U. S. 669.)

3. While the above-mentioned litigation was pending, the Debtor instituted suits in this Court to restrain the State of New Jersey from collecting unpaid balances of the taxes similarly assessed for the years 1934, 1935 and 1936, and after an extended hearing Judge Forman filed an opinion on November 1, 1939, two days after the Debtor had filed its petition in this Court under Section 205, Title 11, U. S. Code, holding that the taxes assessed against the Debtor for the said years 1934, 1935 and 1936 were unlawful and excessive and that an injunction should issue to restrain the collection of further taxes for said years until such time as the taxing authorities of New Jersey should revalue the property of the Debtor in ac-[fol. 324] cordance with the principles laid down in said opinion. The collection of any taxes in excess of 70 percentum of the taxes assessed for said years was enjoined.

4. The Trustees are informed and believe that the method by which the 1932 and 1933 assessments were made against the Debtor's property was similar to the method used by the State in making the 1934, 1935 and 1936 assessments, which this Court held to be illegal and excessive. The Trustees are further informed and believe that the amount of taxes assessed against the Debtor's property for the years 1932 and 1933 are excessive and unlawful, and that this Court has jurisdiction to determine the amount and legality thereof in this proceeding. Pending a determination of the amount of taxes lawfully due and payable for the years 1932 and 1933, however, the Trustees are satisfied that some amount in addition to the payments already made by the Debtor, which aggregate approximately 50 percent of the taxes assessed and levied for the years 1932 and 1933, will ultimately be found to be lawfully due and payable.

5. The Trustees are also advised and believe that funds of the Debtor amounting to $100,000.00 per month during

the next six months are and will be available to make installment payments on account of said 1932 and 1933 taxes over and above amounts needed for administrative expenses, and that it will be consistent with the interests of the Debtor's estate that such installment payments be made, and that in making said payments the Trustees will not be exceeding 70 percent of the taxes assessed for the years 1932 and 1933.

[fol. 325]. Wherefore, the Trustees pray that they be granted authority to pay to the State of New Jersey on account of taxes due and remaining unpaid on the property of the Debtor for the years 1932 and 1933, six monthly installments of $100,000.00 each, beginning July 1, 1940.

Shelton Pitney, Walter P. Gardner, Trustees.

Dated, June 12, 1940.

(Verification dated June 12 omitted in printing.)

[fol. 326] UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

MINUTES OF HEARING BEFORE HON. THOMAS GLYNN WALKER, AT THE POST OFFICE BUILDING, NEWARK, N. J., ON WEDNESDAY, JUNE 12, 1940

APPEARANCES:

Mr. Josiah Stryker, by Mr. Mitchell, Special Counsel for the Trustees.

Hon. Walter Gardner, Trustee.

Mr. Alexander H. Elder, for the Debtor.

Hon. David Wilentz, Attorney General of New Jersey for the State of New Jersey.

Mr. Elder: Your Honor, the facts which are material are stated in the petition that is now being filed, and briefly they are these: By Order Number 1 in this bankruptcy proceed-

ing the Central Railroad was enjoined from paying any taxes due to the State or the municipalities on property in New Jersey. Recently the Attorney General communicated with me inquiring if we were not prepared to pay something additional on the 1932 and 1933 taxes.

The history of those taxes is this: When the 1932 taxes were assessed the Railroad took an appeal to the Board of [fol. 327] Tax Appeals and the appeal was dismissed. The appeal was based on the allegation that the assessed values were very excessive and violated the Constitutional rights of the Railroad. After the Board of Tax Appeals dismissed the appeal, it then went into this court and while the matter was pending the 1933 taxes came along and the taxes for the two years were considered by Judge Forman without taking oral testimony. The issues for the two years were submitted on the record that had been made before the Board of Tax Appeals; and as a condition for the injunction and restraining order that he gave us at that time, the Debtor paid 50 per cent of the tax for those two years.

After Judge Forman had passed on the matter adversely we took an appeal to the Third Circuit which affirmed his decision and then we applied to the Supreme Court for a writ of certiorari which was denied, and later a petition for a rehearing was denied by the United States Supreme Court. While that litigation was pending over a period of years we have similarly contested the 1934, 1935 and 1936 taxes, and the history of that litigation is quite different because after the Federal Court had given us a temporary injunction it went into a trial of the issues involved, the question of what the true value of the Railroad property in New Jersey was for those three years; and after a trial that extended intermittently over about a year, Judge Forman, two years after the trial started and two days after we filed our petition in bankruptcy, handed down his decision in substance holding that the assessments for the years 1934, 1935 and 1936 were illegal, were in violation of our rights under the Due Process Clause of the Federal Constitution.

We have as to those years paid about 60 per cent of the taxes, and in the final decree which Judge Forman entered in those cases for 1934, 1935 and 1936 he made the decree conditioned on our paying up to 70 per cent of the taxes for those three years.

[fol. 328] In his opinion which was announced on November 1, 1939, two days after our bankruptcy started, he made this reference to the earlier decision affecting the years 1932 and 1933:

"Anticipatory to any query relative to the Court's failure to condemn the method of railroad taxation in New Jersey in the 1932 cases, it should be noted that it was there emphatically pointed out that in no event should that decision be construed as a justification or an approval of the methods of the taxing authorities. Furthermore since that time, the Board's failure to give weight to the earnings of the Railroad, and its continued persistence in basing its assessments upon the principles herein condemned, has extended beyond the field of casual disregard of duty and now manifests itself as a permanent abuse of rights which should no longer be countenanced."

Now, in the light of that history and the Attorney General's inquiry a few days ago as to what the Trustees were going to do about those taxes for 1932 and 1933, the Trustees have filed this petition and I read from it merely the statement of their present information, Paragraph 4.

"The Trustees are informed and believe that the method by which the 1932 and 1933 assessments were made against the Debtor's property was similar to the method used by the State in making the 1934, 1935 and 1936 assessments, which this Court held to be illegal and excessive. The Trustees are further informed and believe that the amount of taxes assessed against the Debtor's property for the years 1932 and 1933 are excessive and unlawful, and that this Court has jurisdiction to determine the amount and legality thereof in this proceeding. Pending a determination of the amount of taxes lawfully due and payable for the years 1932 and 1933, however, the Trustees are satis- [fol. 329] fied that some amount in addition to the payments already made by the Debtor, which aggregate approximately 50 per cent of the taxes assessed and levied for the years 1932 and 1933, will ultimately be found to be lawfully due and payable."

Then in the following paragraph the Trustees state to your Honor that they feel that the cash available makes it possible for them, without prejudice to the estate and with-

out interfering with their ability to pay administration expenses, to make instalment payments of $100,000 per month beginning on July first and continuing during the next six months; and we would like to have the Court's permission to do that. And I think perhaps the Attorney General, in view of the conversation I had with him last week, will desire to supplement what I have said as to the importance of our making some token payment on this account currently.

Mr. Wilentz: If your Honor please, the taxes involved were determined to be due by the United States Supreme Court. The matters relating to the appeal and the various steps and processes in connection with the appeal in the other cases as well as these, and the effect of the appeal in the later cases have all been related by the gentleman who has just recited those facts.

We disagree, of course, that this Court will be able to interfere with the judgment decree of the United States Supreme Court in the 1932 and 1933 cases. However that is not a matter for controversy today. That we will eventually have to come to.

We think the whole amount found to be due in those cases, as sustained by the United States Supreme Court will have to be paid and that this Court is without authority to change that amount; but, as I say, for the time being that is not before your honor.

I agree substantially with everything else that counsel has stated, except that we would like to have them increase the amount if the Company can, if the Company is finan-
[fol. 330] cially situated so that they can, from $100,000 to a more substantial amount. I take it that the Railroad's point of view is that if they are required, under Judge Forman's decision, to pay 70 per cent of the amounts assessed, that they probably feel that 70 per cent of the 1932 and 1933 taxes would likely be sustained by this Court. We say that 100 per cent would have to be sustained; they say that only such amount as the Court will find to be fair would be sustained. Assuming, then, that they would only be required to pay 70 per cent as against 100, there would still be 20 per cent of $8,000,000, approximately $8,000,000, for 1932 and 1933, 50 per cent of which they paid. 20 per cent of $8,000,000 would be about $1,600,000 exclusive of interest, charges &c.

Now, they propose to help us with payments of $100,000 per month for six months which would be $600,000. These taxes are very sorely needed by the municipalities affected; they cover various portions of the State, mostly the municipalities in Hudson County; and of course I need not tell your Honor, and I suppose we need not tell any court or anybody that is alive to the predicament of all municipalities just what it means to have been deprived of these great sums, most of which have been appropriated and spent in anticipation of its collection. And it has severely handicapped these municipalities, and frankly, I cannot understand how they have been able to operate while being deprived of these moneys, which they had reason to believe were due and had every reason to believe would be paid. So that right now I think it is not so much a matter of my appealing to your Honor to increase the amount, which I am not appealing to you to do unless these men representing the Railroad Company feel they are able to pay a little more. I think $100,000 is not quite enough, Mr. Elder, unless you men say you are unable to pay any more, of course then I don't want to impose upon the management of this Company in such a way as to interfere with its conduct while it is in the Court's hands. [fol. 331] Mr. Elder: It is very difficult, your Honor, to appraise the possible cash requirements of the railroad during the next six months.

Mr. Wilentz: Could you pay us $200,000 and if you found you couldn't, we would come in before the Court say after the first few months; that still would be way under the 70 per cent. If the Trustees could—after all, this money has to go to the State—we need this money for educational requirements and requirements of a necessary nature.

Mr. Elder: The real difficulty is the uncertainty of the present situation. Two weeks ago we got a notice from the War Department that they were going to assign for hearing on the 20th the propriety of an order requiring us to raise the bridge across the Hackensack River; the estimated cost would be two million and a quarter. Now, these orders of the War Department which are matters so clearly within their jurisdiction, are imponderables. Aside from that we have two million dollars of local taxes under appeal and Jersey City is pressing us just as you are, they are on the local end—and—you represent the State.

Mr. Wilentz: Well, so far as the State is concerned, we have cooperated to the fullest extent with all the railroad companies. As a matter of fact, in these 1932 and 1933 cases, after the decision of the Supreme Court, as you know, we made an arrangement with all the railroad companies to pay as best they could, and they have nearly all of them paid the entire principal amount for 1932 and 1933 in monthly instalments; and I have continued it from time to time at their request and permitted them to pay pretty nearly as they indicated they could, relying absolutely on them in that respect. And I rely upon the Trustees in this case too to the same extent, and if they say that $100,000 is all they can pay, I am going to be satisfied with it. But [fol. 332] I say again to them that I don't want them to be cheap with the State; that is to say, the State needs this money and the municipalities which are to get it need it, and even $200,000 would not be too helpful in view of the extent to which they need the help. But I would like to have the Trustees, if they feel reasonably sure that for the next few months they could increase it to $200,000, that they do so. Even the Lehigh Valley which is now in the hands of the Federal Courts, has been paying $100,000 a month and they paid a million dollars right off at the start.

Mr. Elder: Before coming I tried to get our statement of assets and liabilities for the month of April which I will file in the Court later in the week. I found it was not ready. It is possible, if we might have a recess of five minutes I might talk with Judge Gardner and see what his views are in view of the financial picture.

The Court: Of course you may.

Mr. Wilentz: As a matter of fact if you feel that another day back in the office would give you more information, we can wait and then Judge Gardner can come in and present——

Mr. Gardner: I think a day would be better. Mr. Pitney will be back tomorrow. I don't want to take it upon myself to decide so important a question. As Mr. Elder says, we are committed in so many ways for large payments, and of course we have to keep a working balance because the railroad has a big payroll. Fortunately we are not borrowing any money; that is a fortunate thing in this situation; all we have to do is keep afloat. In addition to this bridge matter, unless—as you may know, the President has vetoed this bill that would put such an expense on the Government

at large, which was passed by both Houses—unless it is passed over again we will have to pay that expense which would be a matter of fifteen months, running into a couple of million dollars—we have the L. C. & N. rental to con-
[fol. 333] sider—we don't know whether we want to keep it or whether we will disaffirm the lease—and we are committed in so many ways to large expenditures, we want to go along and do our share as you want us to, but we don't want to get tied up and come back and say we cannot do that. We want to make a satisfactory agreement and put it through.

Mr. Wilentz: Well, Judge, the amount I am suggesting I think is a reasonable amount. I have tried to do that not only with this railroad company, but all the railroads that have been tied up and I say if you cannot, we are not going to object at this time; we are going to try to go along, but I do hope you will find it possible to increase the amount, and if you find that you can, then you can present the order. It won't be necessary for us to be here.

Mr. Elder: We can agree on the form of the order and then advise the Court tomorrow as to whether the Trustees feel that they can recommend a larger amount.

The Court: Yes.

[fol. 334] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Order No. 53 Authorizing the Trustees to Pay Monthly Installments on Account of Taxes Assessed Against Property of the Debtor by the State of New Jersey for the Years 1932 and 1933

Shelton Pitney and Walter P. Gardner, Trustees of the property of the Debtor herein, having filed their Petition praying that an Order be entered authorizing them to pay six monthly installments on account of taxes assessed against property of the Debtor by the State of New Jer-

sey for the years 1932 and 1933, and the matter coming on to be heard, and the Court having considered the same, It is, on this 13 day of June, 1940, ordered that the Trustees be and they hereby are authorized to pay to the State of New Jersey six monthly installments of $150,000. each beginning July 1, 1940, on account of taxes lawfully due on the property of the Debtor for the years 1932 and 1933.

(S.) Thomas Glynn Walker, United States District Judge.

[fol. 335] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Petition for Order No. 66 Fixing the Time Within Which and Prescribing the Manner by Which Claims of Creditors Shall Be Filed

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

The petition of Shelton Pitney and Walter P. Gardner, Trustees of the Debtor in the above entitled cause, respectfully shows:

1. That Section 77 (c) (7) of the Bankruptcy Act provides that the judge of the court in which proceedings for the reorganization of a railroad are pending shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate, except on order for cause shown, and the manner in which such claims may be filed or evidenced and allowed. No order has been entered in these proceedings which determines [fol. 336] and fixes such time for the filing or evidencing of claims of creditors of the Debtor herein.

Wherefore, your petitioners pray that an order may be entered herein determining and fixing the time within

which the claims of creditors may be filed and evidenced and the manner in which such claims may be filed and evidenced and allowed, and prescribing the notice thereof which shall be given to creditors.

Shelton Pitney, Walter P. Gardner, Trustees of The Central Railroad Company of New Jersey, Debtor.

Filed: Oct. 7, 1940.

(Verification dated Oct. 1st, 1940 omitted in printing.)

[fol. 337] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29778

Order No. 66 Fixing the Time Within Which and Prescribing the Manner by Which Claims of Creditors Shall Be Filed

Shelton Pitney and Walter P. Gardner, the Trustees of the property of the Debtor, having applied on notice duly served on all parties in interest for an order in accordance with Subdivision (c) Paragraph (7) of Section 77 of Chapter 8 of the Acts of Congress relating to bankruptcy (11 U. S. C. A. 205 (c) (7)), determining and fixing a reasonable time within which the claims of creditors may be filed and evidenced and after which no claim not so filed and evidenced may participate except on order for cause shown, and the manner in which such claims may be filed and evidenced and allowed, and the matter having come on to be heard and the court having considered the petition of the Trustees, verified on October 1st 1940, and all the proceedings at such hearing, it is on this 7th day of October, 1940, ordered:

[fol. 338] 1. That the 31st day of December 1940 be and it hereby is fixed as the reasonable time within which the claims of creditors of The Central Railroad Company of

New Jersey, Debtor, including all claims of whatever character against said The Central Railroad Company of New Jersey, or its property, and including claims in tort which accrued prior to October 30, 1939, may be filed and evidenced, and after said date no claim not so filed and evidenced may participate, except on order of this court for cause shown; provided, however, that any claims arising out of the rejection by the Trustees subsequent to October 31, 1940 of any executory contracts or leases may be filed within 60 days after the date of mailing of notice of such rejection; and provided further that the entering into a liquidation agreement between a creditor and the Trustees shall be equivalent to the filing of a claim for the amount agreed upon in such liquidation agreement.

* * * * * * *

3. That each claim shall consist of a statement under oath in writing signed by the claimant, which shall set forth the name and address of the claimant; the nature of the claim, including dates and such other details as shall definitely advise the Trustees of the particulars thereof and distinguish the claim from other claims of a like nature; the consideration therefor; whether any, and if so, what security is held therefor; what payments have [fols. 339-341] been made thereon; any offsets or counterclaims due to the Debtor or the Trustees; full details of any suit pending on such claims and whether judgment has been recovered thereon; any liens, priorities or preferential classifications claimed; that the claim is justly owing from the Debtor to the claimant; and if said claim is founded upon a written instrument, a true copy thereof shall be annexed to the claim.

* * * * * * *

[fol. 342] 8. That when such publication and mailing shall have been completed, the Trustees shall file with the Clerk of this Court, their report with respect thereto.

Guy L. Fake, United States District Judge.

Filed: Oct. 7, 1940.

[fol. 343] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29778

Order No. 93 Allowing Certain Claims and Referring to Special Master Certain Disputed Claims and the Objections Thereto, and Referring the Question of Priority of Claims

The Trustees of the Debtor having filed herein their report and recommendations concerning claims filed and claims liquidated by them pursuant to the provisions of Order No. 66 and having applied for an order of reference to the Special Master to hear and report upon all claims to which objections have been made and which have not been liquidated, subject to the right of the Trustees to enter into additional liquidation agreements, and to hear and report upon all questions of order and priority of claims heretofore or hereafter recommended for allowance; and the matter having been duly noticed for hearing on this day and being opened to the court by Shelton Pitney, one of and on behalf of the Trustees; and it being made to appear that since the filing by the Trustees of [fols. 344-347] their aforesaid report and petition, three certain claims, listed immediately below, have been withdrawn by the claimants and require no further consideration or action by this court, viz.:

Claim No.	*Name*	*Amount*
9	William Pazuk, Jr., by next friend, etc., and William Pazuk, Sr., individually	$25,000.00
15	Stephen Pekarovich	50,000.00
25	Dorothy Mellick	25,000.00

And this court having considered the report, recommendations and petition of the Trustees and good cause appearing herefor and no objection being made hereto:

It is, on this 1st day of April, 1941, on motion of the Trustees, Ordered:

* * * * * * *

[fol. 348] 8. That all disputed claims, except withdrawn Claims Nos. 9, 15 and 25, be and the same are hereby referred to Augustus C. Studer, Jr., Esquire, as Special Master, together with all objections thereto, for hearing and report thereon; provided, however, that the authority of the Trustees in their discretion to enter into liquidation agreements with respect to any of the disputed claims listed in Schedules 4 and 5 of Exhibit "A" annexed to the Trustees' report be and the same is hereby extended to July 1, 1941.

9. That it be and it is hereby also referred to said Special Master to hear, determine and report to this court upon the order and priority of all claims filed (except claims heretofore or hereafter withdrawn, and except Claim No. 24 and Claim No. 114, referred to in paragraphs 1 and 2 hereof, but including all claims heretofore or hereafter liquidated by the Trustees and all claims hereby allowed or hereafter recommended by the Special Master for allowance).

10. That said Special Master be and he is hereby directed upon all contested matters to take the testimony and hear argument, make findings of fact, adopt conclusions of law and submit the same to the Court as his report, either with or without opinion, as said Special Master may consider necessary, calling to his aid, if he deems it advisable, a stenographer, to the end that the testimony may be taken and transcribed and filed; that said Special Master shall regulate the proceedings and all hearings before him, shall have full authority to examine the parties upon, or in regard to, any matter arising before him in pursuance to this order of reference, and, also, to secure by subpoena and subpoena duces tecum, the appearance of witnesses and the production of documents; to examine on oath all witnesses produced by the parties [fol. 349] before him or to require the taking of testimony by deposition in accordance with the Acts of Congress and the General Orders in Bankruptcy; and to direct the mode in which the matters requiring evidence shall be proved

before him; and the form and contents of the report, with opportunity for objections thereto, shall be as provided by the rules of this Court.

11. That the allowance of the principal amount of the Debtor's General Mortgage Bonds, the question of the amounts of the unpresented and unpaid coupons appurtenant or formerly appurtenant thereto of coupon maturities on or prior to January 1, 1939, and the question of the amounts of uncollected and unpaid interest on registered bonds payable on interest dates on or prior to January 1, 1939, abide the filing of the Special Master's report pursuant to Order No. 88; and the said Special Master may, in his discretion, combine the two reports as one report or may make several reports, all as may be expedient or as occasion may require.

12. That this Court hereby reserves the right to revise, alter or amend this order.

Guy L. Fake, United States District Judge.

Filed: April 1, 1941.

[fol. 350] In the District Court of the United States for the District of New Jersey

In the Matter of The Central Railroad Company of New Jersey, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29778

Petition of Trustees for Instructions Concerning Payment of Certain Taxes Levied by the State of New Jersey, and for Show Cause Order Thereon No. 71

To the Honorables the Judges of the United States District Court for the District of New Jersey:

The Petition of Shelton Pitney and Walter P. Gardner, Trustees, respectfully shows:

1. The State of New Jersey has levied certain taxes which became due and payble to the State Treasury on any day between June 1 and December 1, 1940 against the property of the Debtor or for which the Debtor is or may

be directly or indirectly liable, in whole or in part, against certain other properties, as follows:

[fol. 351]

Property of	Amount of Taxes Levied
The Debtor	$3,303,213.18
The Dover & Rockaway Railroad Company	3,872.93
The Ogden Mine Railroad Company	1,388.86
The New York & Long Branch Railroad Company	74,977.38*
Port Reading Railroad Company	8,267.14**
The Bay Shore Connecting Railroad Company	1,118.94*

(* Being the 50% of the entire amount of taxes assessed which the Debtor is under contract to pay.)

(** Being the 33⅓% of the entire amount of taxes which the Debtor is under contract to pay.)

2. The assessments upon which the above mentioned taxes were computed are deemed by your petitioners to be excessive and unlawful and appeals therefrom to the State Board of Tax Appeals of New Jersey have been taken and filed and are now pending.

3. Your petitioners are advised that such parts of said taxes as are not paid pending the outcome of said appeals and as are ultimately found to be due may be subject to interest penalties from December 1, 1940 under Section 54:27-4 of the Revised Statutes of the State of New Jersey.

4. For a statement of the Debtor's obligations in respect of the payment of the taxes so assessed against The Dover & Rockaway Railroad Company, The Ogden Mine Railroad Company, The New York & Long Branch Railroad Company, Port Reading Railroad Company and The Bay Shore Connecting Railroad Company, your petitioners respectfully refer to the allegations set forth in their petition verified on January 15, 1940 entitled "Petition for Order No. 20 of Trustees for Authority with [fol. 352] Respect to Payment of Certain State and Local Taxes Payable in New Jersey".

5. Pursuant to the authority granted to your petitioners by Order No. 58 in this cause your petitioners have acquired all of the 234 shares of stock of The Ogden Mine Railroad Company not theretofore owned or controlled by

the Debtor, and your petitioners are now preparing to dissolve said Company and to dispose of all of its assets in the interests of the Debtor's estate.

6. Your petitioners believe that it will be in the interest of the Debtor's estate that 60%, or some other substantial proportion, of the above mentioned taxes should now be paid in order to avoid the incurring of interest thereon from December 1, 1940 in the event that the pending appeals ultimately fail to reduce the taxes payable, or some of them, to such proportion or a lesser proportion of the entire sums so levied.

Wherefore your petitioners respectfully pray that they may have the aid and instructions of the Court in the premises and that they may be authorized and directed to make payments on account of the taxes referred to in this petition to the extent of 60% of each of said taxes, or to the extent of such other proportion thereof as this honorable Court may fix and determine.

Shelton Pitney, Walter P. Gardner.

Filed: November 25, 1940.

(Verification dated November 25, 1940 omitted in printing.)

[fol. 353] District Court of the United States, District of New Jersey

In the Matter of The Central Railroad Company of New Jersey, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29778

Order No. 71 to Show Cause

Answer of State of New Jersey

Answer and Allegations of the State of New Jersey by David T. Wilentz, Attorney General, to Debtor's Petition herein.

The State of New Jersey, by David T. Wilentz, Attorney General, for its answer to Debtor's Petition herein, says:

1. Paragraphs 1, 2, 3 and 4 of the Petition are admitted.

2. Respondent has no knowledge, information or belief respecting the allegation in Paragraph 5 of the Petition.

3. Further answering said petition, respondent avers as follows:

That the sum of $66,691,090, fixed as the aggregate assessed valuation of the property in railroad use of The [fol. 354] Central Railroad Company of New Jersey for taxation for 1940 is the true value of said property, and that the sum of $3,303,213.18, fixed by the State as the tax against said property of said company for 1940 is a true and proper tax and is legally due and owing to said State. That the sum of $3,104,227, fixed as the aggregate assessed valuation of the property in railroad use of The New York & Long Branch Railroad Company for taxation for 1940 is the true value of said property, and that the sum of $149,954.75, fixed by the State as the tax against said property of said company for 1940 is a true and proper tax and is legally due and owing to said State. This respondent further alleges that the appeal from said tax of 1940 taken by said Central Railroad Company of New Jersey to the State Board of Tax Appeals of New Jersey, as referred to in Paragraph 2 of the Petition herein, is based on similar objections to the valuation of the property of this company and to the tax against said property as were interposed by way of appeal by said company to the valuation and taxation of its property for the year 1933 and that, notwithstanding the assertion of said objections, the valuations of the property of the company and the taxes levied thereon for the year 1933 was sustained by the State Board of Tax Appeals of New Jersey and, on review on writ of certiorari by the New Jersey Supreme Court. The case in which said issue was presented to said court is entitled Central Railroad Company, et al., v. Thayer Martin, reported in Volume 114, New Jersey Law Report, at pages 69, &c. Respondent alleges that in said case the same facts and matters were put in issue and were adjudicated upon as are now set up as grounds for relief in said appeals filed by said company with said State Board of Tax Appeals, as stated in Paragraph 2 of this petition. Respondent further avers that said Supreme Court of New Jersey was and is a [fol. 355] court of competent jurisdiction to hear and determine all said rights, facts and matters, and all questions

of law and fact pertaining thereto, and therefore avers that the said judgment of the New Jersey Supreme Court in the said 1933 case is res judicata with respect to the present appeal referred to in Paragraph 2 of the Petition herein.

Wherefore, the premises considered the State of New Jersey prays

1. That the Trustees of the Debtor be directed to pay immediately to the Treasurer of the State of New Jersey by and for the State of New Jersey the full amount of the taxes levied for 1940 against the Debtor and against the other companies named in Paragraph 1 of the Petition herein.

2. For such other and further relief as to the Court may seem just and equitable.

State of New Jersey, By David T. Wilentz, Attorney General of New Jersey.

[fol. 356] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29778

Order No. 72 Directing the Trustees to Pay Certain Amounts on Account of New Jersey State Taxes for Which the Debtor Is Directly or Indirectly Liable

Shelton Pitney and Walter P. Gardner, Trustees of the property of the Debtor having filed their petition praying for authority to pay certain amounts on account of taxes assessed for the year 1940 by the State of New Jersey against the properties of the Debtor and of certain other companies referred to in said Petition, and the matter coming on to be heard on the return day of Order No. 71 to Show Cause entered herein on November 25, 1940, and all parties to this proceeding having been heard or given

an opportunity to be heard, and the Court having considered the same,

It is, on this 2nd day of December, 1940, Ordered that the Trustees be, and they hereby are, authorized to pay to the State of New Jersey the several amounts set forth below on account of taxes assessed for the year 1940:

[fol. 357]

Property of	*Amount of Taxes to be Paid*
The Debtor	$1,981,927.91
The Dover & Rockaway Railroad Company	2,323.76
The Ogden Mine Railroad Company	833.32
The New York & Long Branch Railroad Coinpany	44,986.43
The Bay Shore Connecting Railroad Company	671.36

and

It is further ordered that no payment or payments pursuant to the provisions of this Order shall constitute an affirmation or adoption of any lease, joint facility contract, or other contract or agreement pursuant to the terms of which any such taxes are paid or advanced, and

It is further ordered that if the State of New Jersey shall file claim in this proceeding for the taxes assessed by it against the property of the Debtor for the year 1940, and if such claim, as finally allowed, shall be less than the sum herein directed to be paid by the Debtor on its own account, any such excess shall be credited against any taxes hereafter assessed against the Debtor. In the event that no claim is filed or allowed for such taxes, then the entire amount herein directed to be paid shall be credited to any taxes hereafter assessed against the said property of the Debtor by the State of New Jersey.

Nothing herein contained shall be so construed as to be a decision of the issues which may be involved as to the validity of the assessments or as to the amount or legality of the taxes. No interest or penalties shall accrue on the amount herein directed to be paid for any period of time after payment thereof.

[fol. 358] The right is reserved to the Attorney General, in the event he concludes that a greater proportion of the

Debtor's 1940 taxes, as assessed, should be paid, to appear before this Court on December 16, 1940 at 10:30 A. M. without further notice, and so move.

Guy L. Fake, United States District Judge.

Filed December 2, 1940.

[fol. 359] IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

In the Matter of CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

No. 29778

On Reorganization under Section 77 of the Bankruptcy Law

Reply of Claimant, State of New Jersey, to Trustees' Objections to Tax Claims

The joint reply of the State of New Jersey, claimant herein, to the several separate objections of said Trustees filed March 3, 1941, to proofs of claim filed December 11, 1940, for unpaid taxes levied by the State of New Jersey upon the property and franchise of the Debtor, and the several subsidiary or affiliated companies whose properties and franchises are in the possession of, and are operated by said Trustees as part of the Debtor's railroad in New Jersey, respectfully shows.

I

Claim No. 38—Central Railroad Company of New Jersey, Debtor

1. It denies all of that part on pages 1 to 6, inclusive under the heading "As to the taxes generally for the years 1932 to 1939, inclusive," except that it admits the payments on account of said taxes in the amounts shown [fol. 360] on Schedule "A" attached to the proof of claim, and it admits paragraphs (o) (p. 5), and (p) (p. 6).

2. It denies paragraphs numbered 1 to 3, inclusive (p, 16).

3. It denies paragraph 4 (pp. 6-7), and says that said appeals have been heard by the State Board of Tax Ap-

peals, but no decision has yet been rendered. It further says that the railroad tax act R. S. 54:26-13 provides:

> "In any suit or proceeding except on such complaint, before the state board of tax appeals or on such certiorari, the certificate and report of the state tax commissioner shall be conclusive and shall have the force and effect of a judgment of a court of record having competent jurisdiction and the proceeding whereon such certificate and report are founded, shall not be inquired into.";

that notwithstanding the pendency of said appeals before the State Board of Tax Appeals, the taxes, as levied against said company by the State Tax Commissioner in his certificates and reports, constitute valid prior liens upon its property, and are due and payable, and in default, in the amounts so levied, unless and until modified or reduced by legal judgment of a board or court of competent jurisdiction.

It further shows:

4. The company against which said taxes were levied is a railroad corporation organized and existing under and by virtue of the laws of the State of New Jersey; its property and franchise in New Jersey are taxable for the support of the government of said state, and the municipal subdivisions thereof in which said property is located, under the provisions of an act of the legislature [fol. 361] of said state entitled "An Act to revise and amend 'An Act for the taxation of a railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," approved March 27, 1888 (N. J. P. L. 1888, ch. CCVIII, p. 269), and the various amendments and supplements thereof, now incorporated in chapters 19 to 29, inclusive of title 54 of the Revised Statutes; that said property and franchise were duly and lawfully assessed for taxes, in accordance with the constitution and laws of New Jersey, for each of the years of 1932 to 1939, both inclusive and the taxes in question were duly and lawfully levied thereon, and there remains due and unpaid taxes and interest in the amounts shown on Schedule "A", respectively, attached to the proof of claim filed herein, subject to lawful interest on the amount of said taxes,

from and after December 1, 1940, until paid, at the rate of one per cent per month as set forth in said proof of claim.

5. Said acts provide that taxes so levied shall be liens paramount to all other liens upon all the lands, tangible property and franchise of the company against which they are levied, effective on the first day of November of the calendar year for which said taxes are levied (N. J. P. L. 1888, p. 274); that if any portion of said taxes shall remain unpaid on the first day of December following the levying thereof, such company shall be considered in default, and such taxes, or the unpaid portion thereof, shall thenceforth bear interest at the rate of one per centum for each month until paid (N. J. P. L. 1922, p. 14).

6. Said unpaid taxes and interest are legally due and owing to claimant and are required by law to be paid by the Trustees, in advance of the payment of other claims, in the order of priority specified in section 64 of the bankruptcy law (11 U. S. C. A., sec. 104, p. 123).

[fol. 362] 7. In the several proceedings set forth in Schedule "C", attached to the proofs of claim, respectively, which are incorporated herein by reference as if repeated in full in this reply, the same causes of action and grounds of complaint as set forth in the Trustees' objections, were alleged and urged in legal proceedings to contest the assessments and taxes levied for each of said years, before the State Board of Tax Appeals, the New Jersey Supreme Court, this Court, the United States Circuit Court of Appeals, Third Circuit, and the Supreme Court of the United States. In each of said proceedings the same rights, facts and matters were put in issue, or were necessarily involved and were adjudicated, therein as are claimed, alleged and set forth in the Trustees' objections filed herein. The said causes of action were between the same parties in interest, or their privies, as the parties in interest, and the same taxes involved, in this proceeding. In each of said proceedings the State Board of Tax Appeals and each of the above mentioned courts, was a court of record of competent jurisdiction to hear and determine the alleged causes of action, and all rights, facts and matters, and all questions of law and fact pertaining thereto, which were in issue, or necessarily involved, in said proceedings, including the validity and amount of the assessments and taxes in question, and

the claim of illegel discrimination. In each of said proceedings all of said issues of fact and law, which are the same issues of fact and law set forth in said objections in this proceeding, and the amount and validity of said taxes so levied were heard and argued, and adjudicated by final judgments or decrees of said Board and Courts, respectively against said railroad company and in favor of the claimant herein, the real party in interest in said proceedings and in this proceeding.

8. The official reports of the decisions in said proceedings, respectively, are correctly set forth in Schedule "C", at-
[fol. 363] tached to the proofs of claim, except that the decision of the Circuit Court of Appeals, Third Circuit, referred to in paragraph (d) with respect to 1932 and 1933 taxes, is reported as Lehigh Valley Railroad Company *v.* J. H. Thayer Martin, State Tax Commissioner, et als., 100 Fed. (2d) 139, and the decision of that court referred to in paragraph (b) with respect to 1934, 1935 and 1936 taxes, is reported as Central Railroad Company *v.* J. H. Thayer Martin, State Tax Commissioner, et als., 115 Fed. (2d) 968.

9. All of said final judgments and decrees (except the decrees of the United States Circuit Court of Appeals, Third Circuit, entered November 27, 1940) were entered and became effective prior to the filing of Debtor's petition in this proceeding.

10. All of the unpaid taxes claimed in the proof of claim accrued and became prior liens upon the property and franchise assessed, and were due, payable and in default before the filing, on October 30, 1939, of the Debtor's petition for reorganization, except that the taxes for 1939, although fully assessed and levied before that date, attached as a prior lien upon said property and franchise on November 1, 1939, and became due and payable, and were in default after, December 1, 1939.

11. All of the grounds of objection stated, and all of the issues of fact and law raised, or necessarily involved, in said objections, with respect to the amount or validity of said assessments and taxes are res judicata in this proceeding.

12. This court has no jurisdiction, power or authority to make a new assessment or tax levy, or to revise or reduce the amount of the assessments or taxes, or any of them, or to abate or reduce the amount of the legal interest which has

[fols. 364-365] accrued, or which may hereafter accrue, to date of final payment, upon the amount of taxes in default on any due date, as prescribed by the railroad tax acts of the State of New Jersey.

[fol. 366] Wherefore Claimant prays for the dismissal of said objections, and each of them, and for allowance of the full amount of each of said claims and interest as set forth in Schedule "A" attached thereto, respectively, together with interests on said taxes, respectively, at the rate of 1% per month and after December 1st, 1940.

David T. Wilentz, Attorney General, Attorney for Claimant, State of New Jersey, State House, Trenton, New Jersey.

March 26, 1941.

[fol. 367] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Petition of the Trustees of the Debtor for Authority to Compromise, Pursuant to Chapter 290 of the Laws of New Jersey of 1941, Certain Taxes Levied by the State of New Jersey for the Years 1932 to 1940, Inclusive, on Properties of the Debtor and Its Subsidiaries, Comprising the Railway System of the Debtor Operated by the Trustees of the Debtor in the State of New Jersey, for an Adjudication of the Amount Thereof, and for Authority to Pay the Same Pursuant to the Terms and Conditions of Said Act, and for Order No. 123 Thereon

To the Honorable Guy L. Fake, one of the Judges of the United States District Court for the District of New Jersey:

The petition of Shelton Pitney and Walter P. Gardner, Trustees, respectfully shows:

1. That this Court, by its Order No. 1, prohibited Debtor from making any payment on account of tax assessments

or other governmental charges, state or local, due or to [fol. 368] become due, and whether theretofore or thereafter assessed, upon its property or any thereof in the State of New Jersey without further Order of this Court.

2. That from time to time subsequent to said Order No. 1, this Court has authorized certain payments to be made on account of taxes assessed by the State of New Jersey upon the properties being operated by your petitioners, but that as of this date the principal amount of said taxes upon the properties of the Debtor's railroad system, as defined in the Act of the New Jersey Legislature hereinafter referred to, alleged to be due and which remained unpaid on July 22, 1941, is as follows:

The Central Railroad Company of New Jersey	$13,438,669.19
The Dover and Rockaway Railroad Company	15,185.44
The Ogden Mine Railroad Company	5,776.23

3. That on July 22, 1941, there became effective an Act of the Legislature of the State of New Jersey entitled "An Act relating to the collection of certain delinquent taxes upon railroad companies", (Chapter 290 of the Laws of New Jersey of 1941).

4. That this Act provides that the State Treasurer is authorized and required to accept, without interest penalties, installment payments of the full principal amount of property taxes upon railroad companies, which were due on or before December first, one thousand nine hundred and forty, and which remained unpaid on said effective date, provided that the delinquent taxpayer has complied with the requirements of Sections 7 and 8 of said Act.

5. That Section 7 of said Act permits any railroad or system, as defined in the Act, or the receiver, trustee or trustees thereof, to enter upon the execution of an installment payment plan authorized under the Act by duly executing [fol. 369] and filing with the State Comptroller a written undertaking, in such form as the Attorney General may prescribe, for the payment of the total amount of delinquent taxes owed by the railroad or system, and paying into the State treasury an amount not less than the first annual installment together with interest on the unpaid balance computed in the manner provided by the Act.

6. That Section 8 of the Act provides that the first payment tendered pursuant to the Act shall be accompanied by a waiver of any and all rights to contest the legality or amount of any assessments made prior to December first, one thousand nine hundred and forty-one, together with stipulations, consents or other papers for the discontinuance and dismissal of all suits, actions and proceedings pending in any court or before the Board of Tax Appeals concerning such assessments, all in such form as the Attorney General may require.

7. That said Act further provides that the total principal amount of delinquent taxes payable thereunder shall be paid in full in accordance with the formula set forth in said Act, and, in accordance with the terms of said formula and its application to the relevant figures of the railway system operated by your Trustees, said system will be required to pay said delinquents in not more than twenty (20) annual installments, if your petitioners are instructed to comply with the provisions of said Act.

8. That your petitioners believe that they should execute and file the undertaking provided for in said Section 7 and should pay on behalf of the railroad and system operated by them under the direction of this Honorable Court, the first annual installment of said delinquent taxes as defined under said Act, insofar as the properties of the Debtor itself are concerned, and in the case of the properties of The Dover and Rockaway Railroad Company and The [fol. 370] Ogden Mine Railroad Company, they should be authorized, in their discretion, to pay the full amount of the principal of said delinquent taxes as defined under said Act, all of said payments to be made, together with interest at three percent from December 1, 1940, as prescribed in said Act, and that the tender of said payments, pursuant to said Act, should be accompanied by a waiver or waivers of any and all rights to protest the legality or amount of any assessment made prior to December first, one thousand nine hundred forty-one, together with stipulations, consents and other papers for the discontinuance and dismissal of all suits, actions and proceedings pending in any court or before the Board of Tax Appeals concerning said assessments, as provided for or permitted by said Act.

9. That your petitioners have drafted and attach hereto (1) as Exhibit 1, a form of undertaking to be executed and filed by them with the State Comptroller of the State of New Jersey pursuant to the provisions of Section 7 of said Chapter 290 of the Laws of New Jersey of 1941, and (2) as Exhibit 2, a form of waiver to be executed and delivered by them with the said payments, or tender of payment, pursuant to the provisions of said chapter, and they respectfully recommend that they be authorized to execute, file and deliver instruments in substantially the form of such attached forms of undertaking and waiver, with such amendments and further instruments, stipulations, consents, or other papers as may be prescribed or required in accordance with said Chapter 290 of the Laws of New Jersey of 1941.

Wherefore, your petitioners respectfully pray:

1. That this Court may find and determine the amount of delinquent taxes due to the State of New Jersey from the Debtor, The Dover and Rockaway Railroad Company, and The Ogden Mine Railroad Com-
[fol. 371] pany, comprising the railway system operated by your petitioners, as defined in Chapter 290 of the Laws of New Jersey of 1941.

2. That this Court may order and direct your petitioners to compromise the total amount of delinquent taxes levied by the State of New Jersey, hereinbefore set forth, pursuant to the terms and conditions of Chapter 290 of the Laws of New Jersey of 1941.

3. That your petitioners be authorized and directed to take such further action as may be necessary to avail themselves of the provisions of said Chapter 290 of the Laws of New Jersey of 1941, and to execute any undertaking or undertakings, waiver or waivers, including an undertaking and a waiver in substantially the forms annexed hereto, and any other necessary or proper stipulations, consents or papers, and, insofar as the properties of the Debtor itself are concerned, to make such first payment or tender thereof, and in the case of the properties of The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company to make such full payments, as may be required

under the provisions of said Act, all of such payments to be made together with interest at three percent from December 1, 1940, computed in the manner prescribed in said Act.

And your petitioners will ever pray, etc.

Shelton Pitney, Walter P. Gardner, Trustees

Dated: August 7, 1941.

Filed: August 8, 1941.

(Verification dated August 7, 1941 omitted in printing.)

[fol. 372] EXHIBIT 1

Undertaking by Shelton Pitney and Walter P. Gardner, Trustees of the Property of The Central Railroad Company of New Jersey

Pursuant to the provisions of Chapter 290 of the Laws of New Jersey of 1941, and for the considerations mentioned therein, Shelton Pitney and Walter P. Gardner, as Trustees of the property of The Central Railroad Company of New Jersey, a corporation of the State of New Jersey, which property is being operated by them as a railroad system reporting to the Interstate Commerce Commission, for themselves and all of the railroad companies whose railroads are included in said railroad system, as defined in said Chapter 290 of the Laws of 1941, hereby undertake and agree to pay the State of New Jersey, in the manner, at the time or times, and within the period or periods, provided by said Chapter 290 of the Laws of New Jersey of 1941, the total principal amount of taxes on the property of said railroad system and all companies whose railroads are included in said system, as defined in said Act, which were due on or before December 1, 1940, and which remain unpaid, together with interest to be computed from and after the 1st day of December, 1940, at the rate of three percent per annum, on the balance of principal due at the time of making such payment.

The obligations of said Trustees of the property of The Central Railroad Company of New Jersey under this undertaking and agreement, shall be obligations of said Trustees solely as Trustees of the property of said The Central

Railroad Company of New Jersey, Debtor, and not individually. The obligations of the Trustees hereunder shall [fol. 373] be assumed by The Central Railroad Company of New Jersey or any other corporation or any receiver or receivers in equity that shall succeed to the Trustees in the possession of the property of the Debtor's Estate, whether pursuant to any plan of reorganization under Section 77 of the Bankruptcy Act or otherwise.

This undertaking and agreement has been approved by Order No. —, dated August —, 1941, of the United States District Court for the District of New Jersey, in proceedings for the reorganization of a railroad, In the Matter of The Central Railroad Company of New Jersey, Debtor, No. 29,778, a copy of which Order is hereto annexed.

The undersigned Trustees hereby further agree that they will execute and file, or cause to be executed and filed, with the State Comptroller of the State of New Jersey, such other or further written undertaking or undertakings as may be prescribed by the Attorney General pursuant to said Chapter 290 of the Laws of New Jersey of 1941.

In Witness Whereof, said Shelton Pitney and Walter P. Gardner, as Trustees of the property of The Central Railroad Company of New Jersey, have hereunto set their hands this — day of August, 1941.

Shelton Pitney and Walter P. Gardner, Trustees of the property of The Central Railroad Company of New Jersey. Shelton Pitney. Walter P. Gardner.

Witness: —— ——.

The undersigned railroad companies, owners of property leased by them to The Central Railroad Company of New [fol. 374] Jersey and operated as part of the railroad system being operated by Shelton Pitney and Walter P. Gardner, as Trustees of said The Central Railroad Company of New Jersey, hereby consent to and join in the foregoing undertaking.

The Dover and Rockaway Railroad Company by E. W. Scheer, President.

Attest: —— ——.

The Ogden Mine Railroad Company by E. W. Scheer, President.

Attest: —— ——.

[fol. 375] Exhibit 2

Waiver

Pursuant to the provisions of Chapter 290 of the Laws of New Jersey of 1941, and for the considerations therein mentioned—

Shelton Pitney and Walter P. Gardner, as Trustees of the property of The Central Railroad Company of New Jersey,
The Central Railroad Company of New Jersey,
The Ogden Mine Railroad Company, and
The Dover and Rockaway Railroad Company,

constituting the system of The Central Railroad Company of New Jersey in the State of New Jersey, as defined in said Act, do hereby severally waive any and all rights to contest the legality or amount of any assessment made prior to December 1, 1941, upon or against any or all of their respective properties used for railroad purposes in the State of New Jersey.

The aforesaid Trustees and Companies severally agree to execute and deliver any other or further waivers of said rights as may be required or prescribed by the Attorney General pursuant to the provisions of said Act.

In Witness Whereof said Trustees and each of said Companies have caused this instrument to be duly executed this — day of August, 1941.

Shelton Pitney and Walter P. Gardner, as Trustees of the property of The Central Railroad Company of New Jersey, by Shelton Pitney, Walter P. Gardner.

—— ——, Witness.

[fol. 376] The Central Railroad Company of New Jersey, by E. W. Scheer, President. (Seal.)

Attest: —— ——.

The Ogden Mine Railroad Company, by E. W. Scheer, President. (Seal.)

Attest: —— ——.

The Dover and Rockaway Railroad Company, by E. W. Scheer, President. (Seal.)

Attest: —— ——.

[fol. 377] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Order No. 123 Authorizing the Trustees of the Debtor to Compromise, Pursuant to Chapter 290 of the Laws of New Jersey of 1941, Certain Taxes Levied by the State of New Jersey for the Years 1932 to 1940, Inclusive, on Properties of the Debtor and Its Subsidiaries, Comprising the Railway System of the Debtor Operated by the Trustees of the Debtor in the State of New Jersey, Adjudicating the Amount Thereof, and Authorizing Payment of the Same Pursuant to the Terms and Conditions of Said Act.

On reading and filing the duly verified petition of Shelton Pitney and Walter P. Gardner, Trustees of the property of the Debtor, for authority to compromise certain taxes levied by the State of New Jersey for the years 1932 to 1940, inclusive, on properties of the Debtor, The Central Railroad Company of New Jersey, and its subsidiaries, The Dover and Rockaway Railroad Company and The Ogden [fol. 378] Mine Railroad Company, which together constitute the "railroad system" of the Debtor operated by the Trustees of the Debtor in the State of New Jersey, as "railroad system" is defined in Chapter 290 of the Laws of the State of New Jersey for the year 1941, for an adjudication of the amount of said taxes, and for authority to compromise and pay said taxes, and the Court having heard said Trustees and being fully advised in the premises, the Court finds, adjudicates and decrees:

That the principal amounts of taxes assessed and levied for said years against The Central Railroad Company of New Jersey or its Trustees by the State of New Jersey, and against The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company, on the properties

in New Jersey of the several companies, are respectively as follows:

Company	*Tax Due*
The Central Railroad Company of New Jersey	$13,438,669.19
The Dover and Rockaway Railroad Company	15,185.44
The Ogden Mine Railroad Company	5,776.23

And that pursuant to Chapter 290 of the Laws of New Jersey of 1941, no interest penalties are due on any of said delinquencies in the event that the compromise provided for by said chapter is duly accepted and said taxes are paid pursuant to such compromise and to the terms and conditions of said Chapter 290.

It is, on this 8 day of August, 1941, Ordered that Shelton Pitney and Walter P. Gardner, as Trustees of the property of the Debtor, shall settle and compromise, and pay the delinquent taxes levied by the State of New Jersey, [fol. 379] hereinabove set forth, pursuant to the terms and conditions of Chapter 290 of the Laws of New Jersey of 1941; that the said Trustees be and hereby they are authorized to execute and file or tender an undertaking and a waiver substantially in the forms attached to the petition of said Trustees to this Court, with such other undertakings, waivers, stipulations, consents and papers as may be prescribed or required to carry out the provisions of said Chapter 290 of the Laws of New Jersey of 1941; that the obligations of said Trustees of the property of The Central Railroad Company of New Jersey under said undertaking and agreement or under any undertaking, agreement or instrument executed and filed or tendered pursuant to this Order, shall be obligations of said Trustees solely as Trustees of the property of said The Central Railroad Company of New Jersey, Debtor, and not individually; that the obligations of the Trustees thereunder shall be assumed by The Central Railroad Company of New Jersey, or any other corporation, or any receiver or receivers in equity that shall succeed to the Trustees in the possession of the property of the Debtor's Estate, whether pursuant to any plan of reorganization under Section 77 of the Bankruptcy Act or otherwise; and

It is Further Ordered that the Trustees be and hereby they are authorized, insofar as the properties of The Central Railroad Company of New Jersey are concerned, presently to tender and pay one-twentieth (1/20) of the total amount of taxes due, and in the case of the properties of The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company presently to tender and pay the full amount of the principal of said delinquent taxes as defined under said Act, each of said payments to be made with interest at three percent. per annum from [fol. 380] December 1, 1940, to the date of payment, as prescribed in said Act, and to be accompanied by such undertaking and waiver or waivers, and other or supplemental papers for the discontinuance and dismissal of all suits, actions and proceedings pending in any court or before the Board of Tax Appeals, or otherwise, concerning said assessments, as may be necessary or proper in order to comply with the provisions of said Act.

Guy L. Fake, United States District Judge.

Filed: August 8, 1941.

[fol. 381] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Petition of Trustees for Order No. 135 Instructing Them Concerning Payment to the State of New Jersey of Taxes Levied Against the Debtor and Certain of Its Affiliated Companies for the Year 1941

To the Honorable Guy L. Fake, Judge of the District Court of the United States for the District of New Jersey:

The petition of Shelton Pitney and Walter P. Gardner, Trustees, respectfully shows:

1. The State of New Jersey, under Chapter 291 of the Laws of 1941, has levied property taxes against the Debtor

and certain of its affiliated companies, which taxes are due and payable on December 1, 1941, as follows:

[fol. 382] *Company*	*Amount*
The Debtor	$2,010,218.76
The Dover and Rockaway Railroad Company	2,368.98
The Ogden Mine Railroad Company	971.28
The New York and Long Branch Railroad Company	44,603.25*
The Bay Shore Connecting Railroad Company	709.86†
Total	$2,058,872.13

* This represents one-half of the amount levied, the other half being payable by The Pennsylvania Railroad Company.

† This represents one-half of the amount levied, the other half being payable by The Lehigh Valley Railroad Company.

No franchise tax is payable by any of said companies for the year 1941.

2. The aforesaid taxes, as provided by Sections 7 and 73 of Chapter 291 of the Laws of 1941, were computed by applying the tax rate of 3% upon the following values of the tangible property of said Companies as said values were assessed under Chapters 19 to 29 inclusive of Title 54 of the Revised Statutes:

Company	*Amount*
The Debtor	$67,007,292.00
The Dover and Rockaway Railroad Company	78,966.00
The Ogden Mine Railroad Company	32,376.00
The New York and Long Branch Railroad Company	2,973,549.00
The Bay Shore Connecting Railroad Company	47,324.00

[fol. 383] 3. On June 6, 1941, by their Petition for Order #107, your Trustees reported that while no final assessments for the year 1941 had been served upon them, yet in view of the tentative assessments they had reason to

expect that said final assessments would be unlawful and under the terms of Revised Statute 54:26-7 any complaint against said assessed values must be filed with the State Board of Tax Appeals not later than June 16, 1941, and requested instructions. This Court, by Order #107, instructed that an appropriate complaint should be filed with said State Board and reserved for future consideration any questions that might arise as to the amount or legality of the taxes levied against the Debtor's property for the year 1941.

4. On June 11, 1941, under the authority of Order #107, your petitioners filed a complaint with the State Board of Tax Appeals alleging that the final values assessed on or about June 7, 1941, against the property of the Debtor, The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company, were arbitrary, excessive and discriminatory, in violation of the Constitution and Statutes of New Jersey and of the Fourteenth Amendment to the Federal Constitution.

5. On July 22, 1941, Chapters 290 and 291 of the Laws of 1941 became effective.

6. Said Chapter 290 provides for the installment payment of the principal amount of delinquent taxes upon railroad companies without interest penalties. By Order No. 123, this Court authorized the Trustees of the Debtor to settle and pay pursuant to said Chapter 290 delinquent taxes levied by the State of New Jersey for the years 1932 to 1940, inclusive, on properties of the Debtor and its subsidiaries, comprising the railroad system of the Debtor operated by the Trustees of the Debtor in the State of New Jersey.

[fol. 384] Following the entry of said Order No. 123, the Trustees of the Debtor, in compliance with the terms thereof and with the terms and conditions of said Chapter 290, duly tendered payment to the Treasurer of the State of New Jersey of one-twentieth (1/20) of the total principal amount of delinquent taxes owed by the Debtor with interest computed in the manner prescribed by said Act; and also tendered payment to the Treasurer of the State of New Jersey the total principal amount of delinquent State taxes of The Dover and Rockaway Railroad Company,

together with interest computed in the manner prescribed by the aforesaid Act; and also tendered payment to the Treasurer of the State of New Jersey the total principal amount of delinquent State taxes of The Ogden Mine Railroad Company, together with interest computed in the manner prescribed by the aforesaid Act.

In further compliance with the terms of said Order No. 123 and with the terms and conditions of said Chapter 290, the Trustees of the Debtor filed with the Comptroller of the State of New Jersey, on behalf of the Debtor and its subsidiaries, an "Undertaking by Shelton Pitney and Walter P. Gardner, Trustees of the Property of The Central Railroad Company of New Jersey" providing for the payment of taxes due for the years 1932 to 1940, inclusive, with interest as prescribed by said Act, and said Trustees filed with the Treasurer of the State of New Jersey a waiver of all rights to contest the legality or amount of any assessment made prior to December 1, 1941, and stipulations and consents for an order of discontinuance of the appeals pending before the New Jersey Board of Tax Appeals for the years 1939, 1940 and 1941.

Up to this date, neither the Trustees of the Debtor nor the Debtor have received any communication advising that said tender has been rejected nor have the certified checks tendered and delivered to the Treasurer of the State of New Jersey on August 11, 1941, been returned. The Attorney General of the State of New Jersey, how-[fol. 385] ever, has filed a Civil Information and an Amended Civil Information contesting the validity of said Chapter 290 of the Laws of New Jersey of 1941. Said Civil Information and Amended Civil Information are still pending and undetermined before the Court of Chancery of New Jersey.

In view of the foregoing, the Trustees do not believe that they should further contest the validity, at this time, of the valuations of the tangible property of the Debtor and said affiliates for the year 1941, which valuations were fixed under the former law but made applicable by Section 73 of Chapter 291 in computing the 1941 tax.

7. Chapter 291 of the Laws of New Jersey of 1941, above referred to, repealed Chapters 19 to 29 inclusive of Title 54 of the Revised Statutes which had theretofore

prescribed the taxes payable on railroad-used property and provided that beginning with the year 1941 each railroad company should be assessed (1) a tax of 3% upon the true value of all its railroad-used property, and (2) a franchise tax of 3% upon the "excess of the franchise base," computed as prescribed in Section 15 of said Act.

Under Chapter 291 the property taxes specified in paragraph 1 above have been levied by the State against the property of the Debtor and certain of its affiliated companies. No franchise taxes have been accrued against the Debtor of any of said companies for the current year, owing to the fact that there is no "excess of the franchise base" subject to said franchise tax for the year 1940.

It is impossible at this time to determine the amount of the franchise tax which may be levied for the year 1942. Depending upon interpretations of Chapter 291, it may be that for the year 1942, if no additional remedial legislation is enacted, the combined property and franchise taxes which will be assessed against the Debtor for the year 1942 may exceed that which would have been levied or payable under the former law.

[fol. 386] The Legislature, on November 14, 1941, enacted New Jersey Assembly Bill #592, which deferred the accrual and payment date of the franchise tax for 1941 to December 15th, and on the same date adopted a Concurrent Resolution directing the Joint Legislative Committee to make a study of the operation of the 1941 railroad tax laws and to make a report thereon to the present session of the Legislature, and authorizing said Committee to make any recommendations to the Legislature which will in any way tend to improve the administration thereof or make more certain the attainment of the objectives sought by the Legislature in the passage of said laws.

One of the objectives of said legislation was to so revise the railroad tax law that taxes on the railroads would be reduced, at least with respect to those railroads which were having difficulty in meeting operating expenses (Report to Governor Charles Edison on Railroad Taxation in New Jersey, dated February 22, 1941, p. 21).

8. Your petitioners submit this summary of recent developments respecting the Debtor's New Jersey tax liability because this question is one of the chief factors in deter-

mining the ability of the Debtor to amortize the installments of back taxes, provide adequate capital improvements in order to serve the public and to meet the various safety and operating requirements of the Interstate Commerce Commission, and provide a basis of reorganization which would meet the requirements of said Commission and of this Honorable Court.

Your Trustees believe that upon a final decision upholding the validity of Chapter 290, providing for the settlement of delinquent taxes, and with amendments which may be adopted to the railroad tax act contained in Chapter 291, the Debtor's aggregate annual New Jersey taxes for the future may be sufficiently reduced to enable the Debtor to amortize the installments of back taxes, to meet the requirements of the service and to provide a proper basis of reorganization.

[fol. 387] In view of the fact that various aspects of these matters are still under study by the Court of Chancery and by the Legislature, your Trustees believe that they should recommend to this Honorable Court the payment in full, without prejudice, of the taxes levied against the Debtor and the affiliated companies referred to in this petition for the year 1941, even though the assessed values placed on the railroad-used property of the Debtor and said affiliated companies are deemed to be excessive.

Wherefore, your petitioners respectfully pray that they may have the aid and instructions of this Honorable Court in the premises, and that they may be authorized and directed to make payment on or before December 1, 1941, of the amount of the taxes levied against the Debtor and the affiliated companies named herein as set forth in paragraph 1 of this petition;

And they further pray that the Order to be made by this Honorable Court on this petition be made without prejudice as to any question which the Debtor or its Trustees may be advised at any time to raise with respect to the interpretation, legality or constitutionality, or otherwise, of Chapter 291 of the Laws of 1941, or of any laws which were repealed by said Chapter 291, and also without prejudice as to any question which the Debtor or its Trustees may be advised at any time to raise as to the validity or propriety of any valuations or taxes which have been or may hereafter

be placed or levied on the properties of the Debtor or of any of its affiliated companies under any of said laws.

Shelton Pitney and Walter P. Gardner, Trustees of the Debtor, by Shelton Pitney.

Dated: November 18, 1941.
Filed: November 21, 1941.

(Verification dated Nov. 18, 1941 omitted in printing.)

[fol. 388] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Minutes of Hearing, Newark, N. J., Monday, November 24, 1941.

On Petition of Trustees for Order instructing them concerning payment to the State of New Jersey of taxes levied.

Before Hon. Guy L. Fake, U. S. D. J.

APPEARANCES:

SHELTON PITNEY, Esq., a Trustee,
HOWARD L. KERN, Esq., and WILLIAM F. HANLON, Esq., for the Debtor.
ISRAEL B. GREENE, Esq., by
BERNARD PROTZEL, Esq., of Counsel for the City of Bayonne.
HOVEY C. CLARK, Esq., for Central Hanover Bank & Trust Co., Trustee.
ROBERT CAREY, JR., Esq.,
MESSRS. SHOENHOLZ & SHOENHOLZ, by
MILTON SHOENHOLZ, Esq., for the Brooks Bondholders Committee.

[fol. 389] Mr. Pitney: With the Court's permission, for the purpose of presenting this motion to the Court I would

like to move the admission of Howard L. Kern of the New York bar, and general counsel of the Debtor.

The Court: Granted.

Mr. Kern: May it please the Court, this petition of the Trustees is for an order instructing them concerning payment to the State of New Jersey of property taxes levied for the year 1941.

The Court: It has not required any notice, has it?

Mr. Kern: We served notice, your Honor.

The Court: Is there anyone appearing for the State? Apparently not.

Mr. Kern: Due notice was served and proof of service has been filed with the Clerk of the Court. These taxes are levied for the year 1941 against the properties of the Debtor and also of certain subsidiary and affiliated companies: The Dover & Rockaway Railroad Company, the Ogden Mine Railroad Company, the New York & Long Branch Railroad Company, and the Bay Shore Connecting Railroad Company. The amount of the tax for the Debtor for the year 1941 is $2,010,218.76; for the Dover & Rockaway Railroad Company, $2,368.98; for the Ogden Mine Railroad Company tax, $971.28; and as to the New York & Long Branch Railroad Company the amount payable by the Debtor is $44,603.25, an equal amount being payable by the Pennsylvania Railroad; and as to the Bay Shore Connecting Railroad Company, the amount of the tax for 1941 is $709.86, half the amount being paid by the Lehigh Valley Railroad Company, as this is jointly owned.

The assessment of the above tax is based upon the valuations set forth in the petition. I won't read all those, but the total valuation of the property of the Debtor as shown in the petition is $67,007,292. Now, these valuations are substantially the same as those referred to in a petition which was filed by the Trustees with your [fol. 390] Honor on June 6, 1941, asking for instructions as to whether a complaint should be filed with the State Board of Tax Appeals; and by Order No. 107 your Honor instructed the Trustees to file such a complaint, and such a complaint was filed as to the amount of this assessment on the properties of the Debtor.

Subsequent to the filing of this complaint, on July 22, 1941, the Legislature enacted the Tax Settlement Act, which is Chapter 290 of the Laws of 1941, and also the Railroad Tax Act, which is Chapter 291 of the Laws of

1941. Now, Chapter 290, briefly stated, provided for the installment payment of the principal amount of delinquent taxes upon railroad companies without interest penalties, providing the terms and conditions of said Chapter 290 were complied with by the company so taxed. The formula provided in Chapter 290 to determine the amount of the installments of delinquent taxes required the payment, in the case of the Debtor, within a period of twenty years and not less than one-twentieth thereof each year.

Among the conditions to be complied with to make effective the Tax Settlement Act under Chapter 290 was the condition that the railroad company must tender the installment provided by the formula on or before December 1, 1941 of each year, and must accompany the first tender with a waiver of all rights to contest the legality or amount of any assessment made prior to December 1, 1941, simultaneously filing with the State Comptroller a written undertaking, in such form as the Attorney General shall prescribe, for the payment of the total amount of delinquent taxes owed by the railroad company in the manner and installment amounts prescribed by the Act.

Order No. 123 was entered by your Honor on petition of the Trustees for authority to settle and pay the delinquent taxes of the Debtor for the years 1932 to 1940, and for the authority to file the undertakings, waivers, stipulations and consents required to carry out the provisions of said Tax Settlement Act, the said Chapter 290. In this [fol. 391] order your Honor found the principal amount of the taxes which had been assessed and levied for the years 1932 to 1940 against the Debtor and which remained unpaid, and found that upon payment of the installment provided by said Act and complying with the other provisions of the Act, no interest penalties would be due, and authorized the Trustees to tender one-twentieth of the total amount of said delinquent taxes of the Debtor, such tender to be accompanied by such undertakings, waivers, stipulations and consents as might be required under the provisions of said Tax Settlement Act.

I shall present a witness in a moment, your Honor, who will testify as to the papers which have been filed with the State Treasurer and the State Comptroller, and as to the making of said tender authorized by your Honor in Order No. 123. However, before presenting such witness I wish to state to your Honor the reason why the

Trustees are recommending payment of the principal amount of the property taxes of the Debtor for the year 1941, which are due and payable on December 1, 1941 as above set forth. That reason is that we filed a waiver with the tender of the first installment of the delinquent taxes under the Tax Settlement Act. That waiver provided that the Trustee waived any and all rights to contest the legality or amount of any assessment made prior to December 1, 1941 upon or against the properties of the Debtor which were used for railroad purposes in the State of New Jersey. Now, the present tax, as to which the Trustees are asking instructions and for which they are asking authority to make payment, was assessed prior to December 1, 1941, and is due and payable on that date.

But the Trustees, in asking this authority, have deemed it advisable to present your Honor the full facts as to the tender made and the undertakings, stipulations and waiver, filed pursuant to your Honor's Order No. 123, and to set forth clearly through witnesses the fact that neither the Trustees nor the Debtor nor any company affiliated with [fol. 392] the Debtor has received any communication from the Attorney General, the State Comptroller or the State Treasurer, advising that any such tenders have been rejected, nor have the certified checks which were tendered and delivered to the State Treasurer on August 11th been returned.

The Trustees have further set forth in the petition that the Attorney General has filed a Civil Information and an Amended Civil Information in the Court of Chancery of New Jersey to contest the validity of said Settlement Act, and this matter is still pending before the said court. Now, in view of all those facts the Trustees have asked for authority to pay the property taxes for the year 1941 in the amount set forth in Paragraph 1 of the petition, but at the same time have requested that any order, that may be made by your Honor on this petition, be made without prejudice as to any question which the Debtor or its Trustees may be advised at any time to raise with respect to the interpretation, legality or constitutionality or otherwise of Chapter 291 of the Laws of 1941, or any laws which were repealed by said Chapter 291.

The Court: How can the Court reserve such rights to you in the face of statutory requirements?

Mr. Kern: The Attorney General is a petitioner in this court for the amount of the taxes due. The Attorney General having contested the validity of the Tax Settlement Act in the Court of Chancery, this Court must necessarily reserve jurisdiction in the event there is any determination as to the propriety of the act, because our tender was made and the waiver was filed pursuant to an act which is now being contested as to its constitutionality. Therefore, the reservation asked is to protect the jurisdiction of this Court to determine the amount and the legality of the taxes in the event that the tender is not accepted because in that event our waiver would not be effective; and the Attorney General would be here to claim [fol. 393] the amount of the taxes alleged to be due and to have the amount determined by this Court. Therefore we are only asking that the reservation be made in order to protect the jurisdiction of the Court and not have any misunderstanding later on in the event the Act is held unconstitutional.

The Court: What sort of waiver did you sign?

Mr. Kern: The waiver is exactly in the form specified in the petition for Order 123 filed by the Trustees and is in the statutory form (Section 8 of the Tax Settlement Act). That was a waiver which the Statute required to accompany the tender.

The Court: It was broad enough to——

Mr. Kern: We waived the right to contest the validity or propriety of any taxes which have been assessed to December 1, 1941.

The Court: You had to do that before you took advantage of the Act.

Mr. Kern: Yes, that was required by Section 8 of the Act.

The Court: Now you want me to give you an order that will save you those rights which you have waived.

Mr. Kern: We aren't asking the Court to——

(Discussion aside with Mr. Pitney.)

I think the point that Mr. Pitney suggests is also pertinent: that we are reserving the right to contest the validity of Chapter 291 with respect to new taxes. But I also stated in my statement that we are also asking for an order that this is without prejudice as to the validity of any taxes assessed under previous laws which were

repealed by Chapter 291. So we are right back to that question as to whether this Court should now do anything that prejudges the whole question in the event that our tender is not accepted or that the law is declared unconstitutional.

Now, so far in my statement I have referred to properties of the Debtor. The evidence that we will introduce also will [fol. 394] relate to the other affiliated companies to which I have referred. The situation as to these affiliated companies is substantially the same except that in the case of some of these subsidiary companies, as will be shown, the amount of back taxes were paid in full, whereas in the case of the Debtor an installment of only one-twentieth of the principal amount of alleged delinquent taxes was tendered.

Now, the Tax Settlement Act provided that the undertaking and waiver and certain other papers should be in such form as the Attorney General shall prescribe. However, the Tax Settlement Act contemplates that conditions of tender, undertakings, waivers, and so forth shall be complied with on or before December 1 in each year. However, in so far as the Trustees have been able to learn, no forms have been prescribed by the Attorney General. The Trustees have drawn all of the forms and have submitted them together with the tender to the state officers, prescribed by statute.

The Court: That tender has been made?

Mr. Kern: Yes, and there has been no indication of any——

The Court: And no objection has been made to them?

Mr. Kern: Not as to the form of any papers.

The Court: And the receipts.

Mr. Kern: We have the receipts for the letters and documents tendered to the State Comptroller and to the State Treasurer, but we have received no receipt for the money. We tendered the money by letter with certified checks. They marked the letter tendering them, "Accepted," but they haven't returned the checks.

The Court: They have not cashed the check?

Mr. Kern: No, they haven't.

The Court: Is there no one here from the Attorney General's office for the State?

Mr. Kern: I haven't seen anyone.

[fols. 395-403] Now, a certified copy of Order No. 123 of this Court was filed with the tender, which was made on behalf of the Debtor and on behalf of the two companies, the Dover & Rockaway Railroad Company and the Ogden Mine Railroad Company, by the Trustees. Now, inasmuch as the Tax Settlement Act required not only the filing of a waiver of the right to contest the legality or amount of any assessment, but also stipulations and other papers for the discontinuance and dismissal of all suits, actions and proceedings pending in any court or before the Board of Tax Appeals, concerning certain assessments, the Trustees accordingly accompanied the tender to the State Treasurer with stipulations and consents for the discontinuance of tax appeals which were pending for the years 1939, 1940 and 1941, and they did not apply for certiorari proceedings as to taxes for the years 1937 and 1938 which would have been filed had it not been for the provisions of the Tax Settlement Act.

If it had not been for the Civil Information and the Amended Civil Information, filed by the Attorney General in the Court of Chancery, there would be no question now as to the propriety of paying, without qualification, the whole amount of the property taxes on the properties of the Debtor and the affiliated companies mentioned in the petition, in view of the stipulations, waivers and consents that have been filed. It is only because of the Civil Information which is pending that we are recommending now the reservation which I have just stated in the record, asking your Honor to make an order without waiving any of the rights as I have stated them and as set forth in the petition.

If your Honor has no further questions, we have witnesses to show the tenders made and the papers filed with the State Treasurer and State Comptroller.

* * * * * * *

[fol. 404] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Order No. 135 Instructing the Trustees to Pay to the State of New Jersey on or Before December 1st Certain Taxes Levied Against the Debtor and Certain of Its Affiliated Companies for the Year 1941

Shelton Pitney and Walter P. Gardner, Trustees of the property of the Debtor, having filed their Petition praying for authority to pay certain taxes levied by the State of New Jersey for the year 1941 against the Debtor and certain other companies referred to in said Petition, and the matter coming on to be heard on notice duly served, and all parties to this proceeding having been heard or given an opportunity to be heard, and the Court having considered the same, and due cause having been shown,

The Court finds, adjudicates and decrees:

That the Trustees of the Debtor have taken all steps necessary on behalf of the Debtor's estate, and on behalf of its affiliated companies, The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company, [fol. 405] to comply with the provisions of Chapter 290 of the Laws of New Jersey of 1941, and have caused The New York and Long Branch Railroad Company and Bay Shore Connecting Railroad Company to take all steps necessary to comply with the provisions of said chapter; that no objection has been made either by the Comptroller, or the Treasurer, or the Attorney General of the State of New Jersey to the Trustees of the Debtor, or to the Debtor, or to any of said affiliated companies, or to this Court, as to the validity or form of any of the tenders, undertakings, waivers or stipulations filed by the Trustees, to comply with said Chapter 290, on behalf of the Debtor's estate and on behalf of its said affiliated companies; that the Trustees of the Debtor having so complied with the requirements of said Chapter 290 and having made due tenders pursuant to said chapter, accompanying said

tenders with waivers of any and all rights which they had to contest the legality or amount of any assessment made prior to December 1, 1941, upon the properties of the said Debtor and of said affiliated companies, and no objection having been filed to the entry of this order,

It is, on this 24th day of November, 1941, ordered that the Trustees be, and they hereby are, authorized to pay to the State of New Jersey, on or before December 1st, the several amounts set forth below on account of taxes assessed for the year 1941:

Company	*Amount of Taxes to be Paid*
The Debtor	$2,010,218.76
The Dover and Rockaway Railroad Company	2,368.98
The Ogden Mine Railroad Company	971.28
The New York and Long Branch Railroad Company	44,603.25
The Bay Shore Connecting Railroad Company	709.86

[fol. 406] and

It is further ordered that this order is made without prejudice to any question which the Debtor or its Trustees may be advised at any time to raise with respect to the construction, legality or constitutionality of, or the amount of any taxes levied after December 1, 1941, pursuant to, Chapter 291 of the Laws of 1941.

And it is further ordered that this order is made without prejudice to any question which the Debtor or its Trustees may be advised at any time to raise in the event that Chapter 290 of the Laws of 1941 is declared unconstitutional or in the event that said chapter is construed in any manner or in any respect inconsistent with the settlement made pursuant to said chapter and to Order No. 123 of this Court.

Guy L. Fake, United States District Judge.

Filed: November 24, 1941.

[fol. 407] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Petition of the Trustees for Instructions Whether or Not they should Comply With Chapter 241 of the Pamphlet Laws of New Jersey of 1942* and for Order No. 161 Requiring the Attorney General, the Comptroller, and the Treasurer of the State of New Jersey, and All Other Parties, to Show Cause Why the Amount of the Tax Claim of the State of New Jersey Against the Debtor for the Years 1932 to 1939 Should Not Be Fixed at the Principal Amount of Taxes Alleged To be Due, Payable in the Manner, at the Time, With the Interest, and Upon the Terms and Conditions Prescribed by Chapter 241, and Why the Interest or Interest Penalties as Claimed by or on Behalf of the State of New Jersey in these Proceedings Should Not Be Disallowed

To the Honorable Guy L. Fake, One of the Judges of the District Court of the United States for the District of New Jersey:

The petition of Shelton Pitney and Walter P. Gardner, as Trustees of the property of The Central Railroad Company of New Jersey, respectfully shows that:

[fol. 408] 1. On or about December 10, 1940 the Honorable Frank J. Murray, Comptroller of the State of New Jersey, filed in this cause proof of claim No. 38, claiming that the Debtor owed to the State of New Jersey on account of unpaid taxes for the years 1932 to 1939, both years inclusive, a total of $12,117,450.68 plus alleged interest thereon in the sum of $7,732,339.50 and additional interest thereon from December 1, 1940 to date of payment. Your petitioners duly objected to said claims upon various grounds, to which objections reference is hereby made for

* See Order No. 163.

greater certainty. Your petitioners objected, inter alia, that no interest penalties could in any event be allowed against the Debtor's estate in view of the express prohibition contained in Section 57j of the Federal Bankruptcy Act against the imposition of penalties upon a bankrupt estate.

2. By Order No. 93 made and entered in this cause on April 1, 1941 said Claim No. 38 of the State of New Jersey was referred, with various other claims, to Augustus C. Studer, Jr., Esquire, as Special Master, together with all objections thereto, for hearing and report thereon in accordance with the provisions of said Order; and this Court expressly reserved the right to revise, alter or amend said Order. No report has been made by the Special Master on said Claim No. 38 and no hearing thereon has been held before him. Subsequent developments have made such a hearing and report unnecessary or impracticable, as from this petition will appear; and your petitioners allege that the emergency hereinafter disclosed requires that this Court take action with respect to said Claim No. 38 before June 15, 1942.

3. By Order No. 123 made and entered in this cause on August 8, 1941 this Honorable Court adjudicated and fixed at $13,438,669.19 the aggregate principal amount of the unpaid taxes levied and assessed by the State of New [fol. 409] Jersey against the Debtor or its Trustees for the years 1932 to 1940, both years inclusive. Said sum of $13,438,669.19 included the aforesaid total principal claim of the State of New Jersey against the Debtor for the years 1932 to 1939 inclusive, plus the excess of the taxes levied and assessed against the estate of the Debtor or its Trustees for the year 1940 over the amount paid by the Trustees on account thereof pursuant to the provisions of Order No. 72 made and entered in this cause on December 2, 1940.

4. By said Order No. 123 this Court also ordered your petitioners, as such Trustees, to settle, compromise and pay said aggregate principal amount of $13,438,669.19 of delinquent taxes in accordance with and in acceptance of the provisions of the then recently enacted Chapter 290 of the Pamphlet Laws of New Jersey of 1941 and authorized your petitioners to execute and file or tender the cer-

tain undertaking and waiver required by said Chapter together with all such other instruments as might be prescribed or required to comply therewith; and further authorized your petitioners to tender and pay the required first installment of one-twentieth of said aggregate principal amount of delinquent taxes of the Debtor and of the estate of the Debtor, together with interest on said aggregate principal amount at the rate of three per cent per annum from December 1, 1940 to the date of payment.

5. Your petitioners duly complied with said Order No. 123 and with said Chapter 290 and took all steps necessary or possible on their part in that behalf, including payment or tender of payment to the Treasurer of the State of New Jersey of $951,872.83 representing said required first installment on account of said delinquent taxes plus interest on said aggregate principal amount thereof at the rate of 3% per annum from December 1, 1940 to the date of said payment. Subsequently, by Order No. [fol. 410] 135 made and entered in this cause on November 24, 1941, this Court adjudicated and decreed that your petitioners had taken all steps necessary on behalf of the Debtor's estate to comply with the provisions of said Chapter 290 of the Pamphlet Laws of New Jersey of 1941.

6. Said Order No. 135 also directed your petitioners on or before December 1, 1941 to pay in full the taxes assessed against the Debtor by the State of New Jersey for the year 1941. The taxes so ordered to be paid had been levied and assessed under and by virtue of Chapter 291 of the Pamphlet Laws of New Jersey of 1941. As your petitioners represented to this Court in their petition for said Order No. 135 and as will appear from the 1941 levy and assessment and the bill presented by the State Tax Commissioner of the State of New Jersey, no franchise tax was levied or assessed against or was payable by the Debtor or its Trustees in and for said year 1941.

7. Your petitioners duly complied with said Order No. 135 and within the time thereby limited paid in full the taxes so levied and assessed against the Debtor by the State of New Jersey in and for the year 1941.

8. By Chapter 169 of the Pamphlet Laws of New Jersey of 1942, approved May 8, 1942, the franchise tax

provisions of said Chapter 291 of the Pamphlet Laws of 1941 were so amended that the franchise taxes payable under the 1941 law by certain other railroads in and for the year 1941 were reduced while, on the contrary, a retroactive franchise tax purportedly became assessable against the Debtor or its Trustees. Acting under and by virtue of said 1942 amendment the State Tax Commissioner of the State of New Jersey has now purported to levy and assess against the Debtor or its Trustees a retroactive franchise tax for the year 1941 amounting to $239,749.80.

[fol. 411] 9. By Chapter 241 of the Pamphlet Laws of New Jersey of 1942, approved May 21, 1942, Chapter 290 of the Pamphlet Laws of 1941 was amended so as to provide that any railroad taxpayer desiring to accept the provisions of the act must, on or before June 15, 1942, file with the State Treasurer a new and additional acceptance document and waiver in the form prescribed by the act, providing for the payment in full of the principal amount of all unpaid taxes for the years 1932 to 1940, both years inclusive, at the times and in the manner provided by the act, and waiving any and all rights to contest the legality or amount of any assessment on its property used for railroad purposes made prior to December 1, 1941 pursuant to the applicable tax acts. By the provisions of said Chapter 241 of the Pamphlet Laws of 1942 the acceptance document thereby required must also waive any and all rights to contest the legality or amount of any assessment "heretofore or hereafter made for the tax year one thousand nine hundred and forty-one". Said act also requires such taxpayer to file with the State Treasurer an additional consent to the discontinuance and dismissal of any and all suits, actions and proceedings pending in any court or before the State Board of Tax Appeals respecting any such assessments and at the same time to pay to the State Treasurer the initial installment payment provided for by the act, with interest as therein specified.

10. Said Chapter 241 of the Pamphlet Laws of New Jersey of 1942 makes no change in the number of installments in which the Debtor may pay the aggregate principal amount of its delinquent taxes for the years 1932 to 1940, both years inclusive, or in the amount of any install-

ment of principal, as compared with Chapter 290 of the Pamphlet Laws of 1941, but does require the taking of the various steps necessary to a compliance with the act and the making of the initial payment thereunder on or before June 15, 1942 and further requires that such initial [fol. 412] payment shall include interest at the rate of 3% per annum on the entire aggregate principal amount of tax delinquencies from December 1, 1940 to the date of such first installment payment, thus adding substantially to the amount of interest paid or tendered by your petitioners pursurant to the 1941 law and as directed by said Order No. 123.

11. Said Chapter 290 of the Pamphlet Laws of New Jersey of 1941 provided that the liens of the State of New Jersey for taxes and interest penalties of each year for which delinquent taxes were payable pursuant to said act should be fully satisfied and discharged, in the order in which such taxes accrued, when and as principal payments on account thereof should equal or exceed the full principal amount delinquent for any tax year, and when interest at 3% per annum upon all unpaid balances had been paid in full; and that upon default of all or part of an installment payment in any year or of interest upon the unpaid balance the whole remaining amount of delinquencies including interest penalt-es should, subject to the provisions aforesaid, be reinstated and become due and payable thirty days after the date of default. Said Chapter 241 of the Pamphlet Laws of New Jersey of 1942 provides in part, in lieu of the foregoing, as follows:

> "Upon default in the making of any payment provided for in the acceptance document, and a continuance thereof for a period of thirty days after the due date of such payment, the then remaining unpaid balance of taxes, together with statutory interest penalties with respect to any and all taxes assessed against such taxpayer or upon its property used for railroad purposes for any of the years one thousand nine hundred and thirty-two to one thousand nine hundred and forty, inclusive, calculated from the original due date of such taxes shall immediately be [fol. 413] come due and payable, and the State may assert, exercise and enforce any and all rights, claims, demands, liens and privileges with respect thereto as

if this act had not been enacted, and in addition thereto may assert and enforce any remedies it may have acquired under such acceptance document except that such taxpayer shall be entitled to a credit against such statutory interest penalties in an amount equal to the interest paid pursuant to the provisions of this act."

12. Said Chapter 241 of the Pamphlet Laws of New Jersey of 1942 also provides that should any such taxpayer so direct in the acceptance document filed pursuant to the act, the State Treasurer is authorized and required to collect the amount of any draft or check delivered to him by such railroad taxpayer pursuant to the provisions of Chapter 290 of the Pamphlet Laws of New Jersey of 1941 and to credit the same to the payments required to be made by such taxpayer under said Chapter 241.

13. Your petitioners are advised and therefore allege that grave doubts exist as to the legality and constitutionality of the purported retroactive levy and assessment against the Debtor or its Trustees under and by virtue of said Chapter 169 of the Pamphlet Laws of New Jersey of 1942 of any franchise or privilege tax for the year 1941, and, specifically, of the franchise tax amounting to $239,749.80 actually attempted to be so levied and assessed thereunder as aforesaid; that apart from the retroactive nature of said law and of said tax, and the payment in full as above set forth of all taxes assessed upon the estate of the Debtor for the year 1941, other grave doubts exist as to the legality and constitutionality of the franchise tax provisions of Chapter 291 of the Pamphlet Laws of New Jersey of 1941, as amended by said Chapter 169 of the Pamphlet Laws of New Jersey of 1942, as said provisions apply to the Debtor, because of the discriminatory opera- [fol. 414] tion and effect of said Laws upon the Debtor's business and property and their failure to provide for the deduction from the Debtor's net railway operating income of the amounts paid by order of this Court for use and occupation or rent to The Lehigh Coal and Navigation Company for the more profitable portion of the Debtor's lines located entirely in the State of Pennsylvania, thus resulting in the capitalization, in computing the franchise tax, of an expense necessary to profitable operation as if such expenses were income; and that other serious questions

exist as to the validity, legality and constitutionality of said Statutes as applied to Debtor.

14. Your petitioners are uncertain whether or not they should comply with and submit the Debtor's estate to the additional burdens, conditions, payments and agreements required by the provisions of Chapter 241 of the Pamphlet laws of New Jersey of 1942, in view of their earlier compliance with the provisions of Chapter 290 of the Pamphlet Laws of New Jersey of 1941 and in view of the provisions of Section 57j of the Federal Bankruptcy Act. Especially, they are uncertain whether to pay said retroactive franchise tax for 1941 of $239,749.80 and the additional interest required by said Chapter to be paid. Your petitioners allege that they should not be required to comply with said Chapter 241 unless or until this Court shall have adjudicated that the amount of the claim of the State of New Jersey against the Debtor for the years 1932 to 1939, both years inclusive, is the principal amount of taxes alleged to be due by the Debtor for said years, payable in the manner, at the times, with the interest, and upon the terms and conditions prescribed by said Chapter 241, and shall further have disallowed and dismissed the claim or claims of the State of New Jersey for interest or interest penalties on any of the aforesaid principal amount of taxes.

[fol. 415] 15. Your petitioners are informed and therefore allege that subsequent to the entry of Order No. 123 in this cause and subsequent to compliance by your petitioners with said Order and with Chapter 290 of the Pamphlet Laws of New Jersey of 1941 the Attorney General of the State of New Jersey filed a civil information and later an amended civil information in the Court of Chancery of New Jersey wherein and whereby he challenged the constitutionality of said Chapter 290. Your petitioners have recently been further informed and therefore allege that on May 21, 1942, the day on which Chapter 241 of the Pamphlet Laws of New Jersey of 1942 was approved, the Attorney General filed a supplemental civil information in said Court of Chancery challenging the constitutionality of said Chapter 241. Your petitioners show, however, that no final decision or decree by said Court of Chancery or by the Court of Errors and Appeals of the State of New Jersey touching the constitutionality of said laws can be

expected for many months, whereas your petitioners will be obliged to act, if they are to comply with said Chapter 241, on or before June 15, 1942. Your petitioners also show that this Honorable Court alone has jurisdiction to pass upon the claim of the State of New Jersey for interest penalties and that no future decision or decree of the Courts of the State of New Jersey can affect the allowability of such claim, or the finality of Order No. 123 and Order No. 135 in this cause.

Wherefore, your petitioners pray that they may have the protection of this Honorable Court in the premises and particularly the instructions of this Court whether or not they should comply with the provisions of Chapter 241 of the Pamphlet Laws of New Jersey of 1942; and that the Honorable David T. Wilentz, Attorney General of the State of New Jersey, the Honorable Homer C. Zink, Comptroller of the State of New Jersey, and the Honorable Robert C. Hendrickson, Treasurer of the State of New [fol. 416] Jersey, and all other parties to this proceeding, be required to show cause before this Honorable Court why the amount of the tax claim of the State of New Jersey against the Debtor for the years 1932 to 1939, both years inclusive, should not be fixed and adjudicated at the principal amount of taxes alleged to be due, payable in the manner, at the times, with the interest, and upon the terms and conditions prescribed by said Chapter 241, and why the interest or interest penalties as claimed by or on behalf of the State of New Jersey in this proceeding should not be disallowed.

And your petitioners will ever pray, etc.

Shelton Pitney, Walter P. Gardner, Trustees.

Dated: June 2, 1942.
Filed: June 2, 1942.

Verification dated June 2, 1942, omitted in printing.)

[fol. 417] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Order No. 161 to Show Cause

Upon reading and filing the petition of the Trustees duly verified the second day of June, 1942 for instructions whether or not they should comply with Chapter 241 of the Pamphlet Laws of New Jersey of 1942 and for other relief,

It is on this second day of June, 1942 ordered that Monday, the 8th day of June, 1942 at 10:30 A. M. (E. W. T.) in the court rooms of this Court in the Post Office Building, Federal Square, Newark, N. J., be and the same is hereby fixed as the time and place for the hearing upon said petition.

And it is further ordered that the Honorable David T. Wilentz, Attorney General of the State of New Jersey, the Honorable Homer C. Zink, Comptroller of the State of New Jersey, and the Honorable Robert C. Hendrickson, Treasurer of the State of New Jersey, and all other parties to this cause, including all parties to whom notices of hear-[fol. 418] ings are customarily given, be required to show cause before this Court at the time and place aforesaid why the amount of the tax claim of the State of New Jersey against the Debtor for the years 1932 to 1939, both years inclusive, should not be fixed and adjudicated at the principal amount of taxes alleged to be due, payable in the manner, at the times, with the interest, and upon the terms and conditions prescribed by said Chapter 241, and why the interest or interest penalties as claimed by or on behalf of the State of New Jersey in these proceedings should not be disallowed and dismissed.

And it is further ordered that notice of the aforesaid hearing and of the return date of this order to show cause shall be given to the Honorable David T. Wilentz, Attorney General of the State of New Jersey, the Honorable Homer C. Zink, Comptroller of the State of New Jersey, and the Honorable Robert C. Hendrickson, Treasurer of the State

of New Jersey, and to each other party to these proceedings, including each party to whom notices of hearings herein are customarily given, by serving a copy of this order to show cause and a copy of said petition of the Trustees upon each such person and party, either personally or by leaving such copies at their respective offices with their respective clerks or other persons in charge thereof, within one day from the date of this order.

Guy L. Fake, United States District Judge.

Filed: June 2, 1942.

[fol. 419] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Order No. 163 Adjudicating the Amounts in Which the Claims of the State of New Jersey Should Be Allowed and Directing the Trustees to Comply with Chapter 241 of the Laws of New Jersey of 1942 *

This matter coming on for hearing at the time and place fixed by Order No. 161 in this cause for the hearing upon the petition of the Trustees of the Debtor for instructions whether or not they should comply with Chapter 241 of the Laws of New Jersey of 1942 and for other relief; and the matter having been opened to the Court by Shelton Pitney, one of and on behalf of the Trustees, in the presence of the Honorable David T. Wilentz, Attorney General of the State of New Jersey, the Honorable Homer C. Zink, Comptroller of the State of New Jersey, and J. H. Thayer Martin, Esq., counsel for the Honorable Robert C. Hendrickson, Treasurer of the State of New Jersey, and in the presence of counsel for various other parties to this proceeding; and testimony having been adduced by and on

* The petition for and Order No. 162 relate to a different subject and are printed hereafter.

behalf of the Trustees in support of the allegations of their petition, and this Court having considered said testimony and the documentary evidence introduced, and [fol. 420] having heard and considered the arguments of said Messrs. Pitney, Wilentz, Zink and Martin,

The Court does hereby find and adjudicate the following facts:

(1) On or about December 10, 1940 the State of New Jersey, by its Comptroller, filed in this cause proof of claim No. 38, claiming that the Debtor owed to the State of New Jersey on account of unpaid taxes for the years 1932 to 1939, both inclusive, a total of $12,117,450.68, plus alleged interest thereon in the sum of $7,732,339.53, and additional interest thereon from December 1, 1940 to date of payment. At the same time the State of New Jersey, by its Comptroller, filed in this cause additional proofs of claim for unpaid taxes for said years against the several companies and in the several amounts as follows:

No. of Claim	*Name of Company*	*Principal Amount of Claim*	*Amount of Interest Claimed*
34	The Central Railroad Company of New Jersey, as lessee of The Ogden Mine Railroad Company	$5,220.69	$5,149.19
35	The Central Railroad Company of New Jersey, as joint operator of The New York and Long Branch Railroad Company	318,305.30	140,495.05
36	The Central Railroad Company of New Jersey, as lessee of The Dover and Rockaway Railroad Company	13,636.37*	9,302.82
37	The Central Railroad Company of New Jersey, as joint operator of Bay Shore Connecting Railroad Company	5,528.40	3,601.50

* This should be "13,636.27."

[fol. 421] All of the claims for interest were made with additional claims for 1% per month on the principal

amounts claimed from December 1, 1940 to date of payment.

(2) The Trustees of the Debtor objected to all of said claims upon various grounds, to which objections reference is hereby made for greater certainty.

(3) By order No. 93 made and entered in this cause on April 1, 1941, said Claims Nos. 34, 35, 36, 37 and 38 of the State of New Jersey were referred to Augustus C. Studer, Jr., Esq., as Special Master, together with all objections thereto, for hearing and report thereon in accordance with said Order. No report has been made by the Special Master on said claims or any of them and no hearing thereon has been held before him.

(4) A recent statute enacted by the Legislature of the State of New Jersey has rendered it impracticable and impossible for the Special Master within the time limit therein fixed, to hear and report upon said claims, and requires that this Court take prompt action in the premises.

(5) By order No. 123 made and entered in this cause on August 8, 1941 this Court adjudicated and fixed at $13,438,669.19 the aggregate principal amount of the unpaid taxes levied and assessed by the State of New Jersey against the Debtor or its estate for the years 1932 to 1940, both inclusive, and adjudicated and fixed at $15,185.44 the aggregate principal amount of the unpaid taxes levied and assessed by the State of New Jersey against the properties of The Dover and Rockaway Railroad Company for the years 1942* to 1940, both inclusive, and adjudicated and fixed at $5,776.23 the aggregate principal amount of the unpaid taxes levied and assessed by the State of [fol. 422] New Jersey against the properties of The Ogden Mine Railroad Company for the years 1932 to 1940, both inclusive. Said sums of $13,438,669.19, $15,185.44, and $5,776.23 included the aforesaid total principal amounts of taxes claimed by the State of New Jersey against the Debtor, The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company, respectively, for the years 1932 to 1939, both inclusive, plus the excess of the taxes levied and assessed against the estate of the Debtor or its Trustees, against said The Dover and Rockaway

* This should be "1932."

Railroad Company and against said The Ogden Mine Railroad Company for the year 1940 over the amount paid by the Trustees or caused to be paid by the Trustees on account thereof pursuant to the provisions of Order No. 72 made and entered in this cause on December 2, 1940.

(6) By said Order No. 123, this Court ordered the Trustees of the Debtor to settle, compromise and pay said aggregate principal amounts of $13,438,669.19, $15,185.44 and $5,776.23 of taxes claimed in accordance with and in acceptance of the provisions of the then recently enacted Chapter 290 of the Laws of New Jersey of 1941, and authorized the Trustees to execute and file or tender the certain undertakings and waivers required by said chapter together with all such other instruments as might be prescribed or required to comply therewith; and further authorized the Trustees to tender and pay the required first installment of one-twentieth of said aggregate principal amount of $13,438,669.19 and said entire sums of $15,185.44 and $5,776.23, together with interest on said principal amounts at the rate of 3% per annum from December 1, 1940 to the date of payment.

(7) The Trustees of the Debtor duly complied with said Order No. 123 and with said Chapter 290, and took all steps [fol. 423] necessary or possible on their part in that behalf, including payment or tender of payment to the Treasurer of the State of New Jersey of $951,872.83, representing the required first installment on account of said alleged State taxes relating to properties of the Debtor, plus interest at the rate of 3% per annum from December 1, 1940 to the date of said payment, on the aggregate principal amount of taxes alleged to be due, and by paying or tendering to the said Treasurer the full principal amounts of alleged State taxes of The Dover and Rockaway Railroad Company and of The Ogden Mine Railroad Company, together with interest computed in the manner prescribed by said Act. The Trustees of the Debtor further caused The New York and Long Branch Railroad Company and Bay Shore Connecting Railroad Company to take all steps necessary to comply with the provisions of said Chapter.

(8) Subsequently, by Order No. 135 made and entered in this cause on November 24, 1941, this Court adjudicated and decreed that the Trustees of the Debtor had taken all

steps necessary on behalf of the Debtor's estate and on behalf of its affiliated Companies, The Dover and Rockaway Railroad Company and The Ogden Mine Railroad Company, to comply with the provisions of said Chapter 290 of the Laws of New Jersey of 1941, and had joined in causing The New York and Long Branch Railroad Company and Bay Shore Connecting Railroad Company to take all steps necessary to comply with the provisions of said chapter.

(9) Said Order No. 135 also directed the Trustees on or before December 1, 1941 to pay in full the taxes assessed against the Debtor and its said affiliated companies by the State of New Jersey for the year 1941. Said taxes so ordered to be paid had been levied and assessed under and by virtue of Chapter 291 of the Laws of New Jersey [fol. 424] of 1941. No franchise tax was levied or assessed against or was payable by the Debtor or its Trustees in and for said year 1941 under or by virtue of said Chapter 291.

(10) The Trustees of the Debtor duly complied with said Order No. 135 and within the time thereby limited paid in full the taxes so levied and assessed against the Debtor and said affiliated companies by the State of New Jersey in and for the year 1941.

(11) By Chapter 169 of the Laws of New Jersey of 1942, approved May 8, 1942, the franchise tax provisions of said Chapter 291 of the Laws of 1941 were so amended as to make the Debtor or its Trustees assessable for a retroactive franchise tax for the year 1941. Acting under the authority of said 1942 amendment, the State Tax Commissioner of the State of New Jersey has now purported to levy and assess against the Debtor or its Trustees a retroactive franchise tax for the year 1941 amounting to $239,749.80.

(12) By Chapter 241 of the Laws of New Jersey of 1942, approved May 21, 1942, Chapter 290 of the Laws of 1941 was amended so as to provide that any railroad taxpayer desiring to accept the provisions of the Act must, on or before June 15, 1942, file with the State Treasurer a new and additional acceptance document and waiver in the form prescribed by the Act, providing for the payment in full of the principal amount of all unpaid taxes for the

years 1932 to 1940, both inclusive, at the times and in the manner provided by the Act, and waiving any and all rights to contest the legality or amount of any assessment on its property used for railroad purposes made prior to December 1, 1941, pursuant to the applicable tax Acts. The acceptance document so required must also waive any and all rights to contest the legality or amount of any assessment "heretofore or hereafter made for the tax year one thousand [fol. 425] nine hundred and forty-one". Said Act also requires such taxpayer to file with the State Treasurer an additional consent to the discontinuance and dismissal of any and all suits, actions and proceedings pending in any court or before the State Board of Tax Appeals respecting any such assessments and at the same time to pay to the State Treasurer the initial installment payment provided for by the Act, with interest as therein specified.

(13) The Trustees submitted in evidence at the hearing on the return of Order No. 161 a proposed form of "Acceptance and Waiver", a proposed "Discontinuance and Dismissal", and a proposed "Letter of Transmittal to the State Treasurer", in form sufficient to comply with said Chapter 241.

(14) Said Chapter 241 requires the taking of the various steps necessary to a compliance therewith and the making of the initial payment thereon on or before June 15, 1942 and further requires that said initial payment shall include interest at the rate of 3% per annum on the entire aggregate principal amount of taxes claimed from December 1, 1940 to the date of such first installment payment. Said requirement has the effect of adding substantially to the amount of interest required to be paid or tendered by the Trustees to the Treasurer of the State of New Jersey in excess of the amount paid or tendered by them pursuant to the 1941 law and as directed by said Order No. 123 of this Court, notwithstanding that the Trustees and the Debtor's estate have not since had the use of the moneys so paid or tendered.

(15) Said Chapter 241 of the Laws of New Jersey of 1942 also contains provisions penalizing any future defaults in the making of any payment provided for in the acceptance document in a manner more onerous than the penalties [fol. 426] provided for by said Chapter 290 of the Laws of 1941 in the event of a default in compliance therewith.

This Court does hereby Order, Adjudicate and Decree:

1. That it is essential to the reorganization of the Debtor's estate that the amount of the Debtor's major obligations be promptly fixed, determined and settled.

2. That, because Chapter 241 of the Laws of New Jersey of 1942 requires that said chapter must be accepted if at all, on or before June 15, 1942, it is necessary to the reorganization of the Debtor and to the orderly conduct of this cause that this Court at this time pass upon the fairness of the settlement offered by the State of New Jersey and the amounts for which the State's claims should be allowed, and to that end this Court does hereby revoke so much of Order No. 93 in this cause as referred claims Nos. 34, 35, 36, 37 and 38, together with all objections thereon, to the Special Master for hearing and report thereon.

3. That for the reasons set forth in the objections filed in this proceeding by the Trustees of the Debtor to each of said claims there is ground for serious doubt as to whether the full amount of taxes claimed is legally due.

4. That the Trustees of the Debtor should not be required to comply with Chapter 241 of the Laws of New Jersey of 1942 without a simultaneous order by this Court adjudicating the amounts for which the aforesaid claims of the State of New Jersey, for the years 1932 to 1939, inclusive, and the balances in dispute for 1940 should be allowed.

[fol. 427] 5. That, since a determination must be made prior to June 15, 1942, as to whether or not the Trustees should accept the provisions of Chapter 241 of the Laws of 1942, since, further, it is not possible for the Court in the short time available before that date to try the issues of fact raised by Claims Nos. 34 to 38 inclusive, and the objections filed thereto and determine accurately the amounts now legally due; and since the Court, as a matter of law, has concluded that the offer of settlement officially tendered by the claimant through the enactment of Chapter 241 is a valid and subsisting offer made to carry into effect a public policy set forth in said act, at least so far as a debtor railroad in reorganization under the Bankruptcy Act is concerned, the Court hereby adjudicates the amount for which said claims of the State of New Jersey against the

Debtor's estate (including the balances in dispute for 1940 *) should be and they are hereby allowed as follows:

Name of Company	*Amount of Claim Allowable*
The C.R.R. Co. of N.J., Lessee of The Ogden Mine R.R. Co.	$5,220.69
The C.R.R. of N.J., as Joint Operator of The New York & Long Branch R.R. Co.	318,305.30
The C.R.R. Co. of N.J., as Lessee of The Dover & Rockaway R.R. Co.	13,636.37†
The C.R.R. Co., of N.J. as Joint Operator of Bay Shore Connecting R.R. Co.	5,528.40
The C.R.R. Co. of N.J., Debtor	13,438,669.19

payable in the manner, at the times, with the interest and upon the terms and conditions prescribed by said Chapter 241.

[fol. 428] 6. The Trustees accordingly should be and they are hereby instructed and directed on or before June 15, 1942 to comply and on behalf of themselves and their successors to agree to comply in the future in all respects with said Chapter 241 and to make the payments therein required to be made—all in the manner, at the times, with the interest and upon the terms and conditions therein prescribed; and this Court hereby adjudges that upon full compliance as aforesaid Claims Nos. 34, 35, 36, 37 and 38 will have been fully satisfied and discharged.

7. That the obligations of the Trustees under each and all of the documents to be filed by them as above ordered shall be their obligations solely as Trustees of the property of the Debtor and not their individual obligations and that all obligations of the Trustees filed pursuant to this order and said Chapter 241 shall be assumed by The Central Railroad Company of New Jersey, or any other corporation, or any receiver or receivers or trustee or trustees, who may succeed the Trustees in possession of the property of the

---

* In the case of the properties of the Debtor only (see finding 1 on page 2768).

† This should read "13,636.27."

Debtor's estate, whether pursuant to any plan of reorganization under Section 77 of the Bankruptcy Act, or otherwise. Nothing herein contained shall be construed as passing upon the validity or invalidity of Chapter 290 P.L. 1941 or Chapter 241 P.L. 1942 attacks upon which are now pending in the State Courts.

Guy L. Fake, United States District Judge.

Dated: June 12, 1942.
Filed: June 12, 1942.

[fol. 429] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Petition of Trustee for Order for Instructions Regarding the Payment of Taxes to the State of New Jersey

To the Honorable Guy L. Fake, Judge of the United States District Court for the District of New Jersey.

The petition of Walter P. Gardner, Trustee of the property of the Debtor, respectfully shows that:

1. Your petitioner and Shelton Pitney were appointed Trustees of The Central Railroad Company of New Jersey by order of this court dated the 28th day of November, 1939, and duly qualified as such Trustees under said order. On January 13, 1946, Shelton Pitney died and since that date the properties of the debtor have been and now are being operated by your petitioner as sole surviving Trustee.

2. On October 30, 1939, the debtor filed its petition herein because the State of New Jersey had threatened to enter judgment and sell its properties located within [fol. 430] the State for nonpayment of 1932 and 1933 taxes, litigation concerning which had resulted unfavorably to the debtor.

3. In December, 1940, the State of New Jersey filed its claim No. 38, against the debtor, for $12,117,450.68 taxes, plus interest thereon in the sum of $7,732,339.53, plus additional interest on said unpaid taxes from December 1, 1940 to the date of payment, claiming said taxes to be a lien paramount to all other liens upon all of the lands and tangible property and franchises of the company in the State of New Jersey, in accordance with the provisions of Section 54:27-4, Revised Statutes of the State of New Jersey, such lien taking effect on June 1 of the year in which the tax is payable.

4. At the time the debtor filed its petition for reorganization, as aforesaid, practically all the railroads operating in New Jersey were in default in payment of their franchise and property taxes and a number like the debtor had filed their petitions for reorganization under the Bankruptcy Act. The Governor of the State taking cognizance of this situation appointed a committee to investigate the railroad tax problem. The Governor's committee on February 22, 1941, made a comprehensive report, which was subsequently considered by a committee of the Legislature, with the result that Chapters 290 and 291 were passed and approved and became effective on July 22, 1941. Chapter 290 is commonly known as the first Railroad Tax Settlement Act. Chapter 291, P.L. 1941, provided for taxes on both the franchises and properties of railroads doing business within the State of New Jersey.

5. By the provisions of Chapter 290 the State Treasurer was authorized and required to accept, without interest penalties, installment payments of the principal [fol. 431] amount of the taxes assessed and unpaid for the years 1932 to 1940 inclusive, provided the railroad taxpayer complied with Sections 7 and 8 of the said Act, the provisions of which were as follows:

> "7. Undertaking; first payment. Any railroad or system, or the receiver, trustee or trustees thereof, may enter upon the execution of an installment payment plan authorized under this act by (1) duly executing and filing with the State Comptroller a written undertaking, in such form as the Attorney-General shall prescribe, for the payment of the total amount of delinquent taxes owed by the railroad or

system and (2) paying into the State treasury an amount not less than the first annual installment together with interest on the unpaid balance computed in the manner provided by sections two, three and four of this act.

"8. Waivers. The first payment tendered pursuant to this act shall be accompanied by a waiver of any and all rights to contest the legality or amount of any assessment made prior to December first, one thousand nine hundred and forty-one, together with stipulations, consents or other papers for the discontinuance and dismissal of all suits, actions, and proceedings pending in any court or before the Board of Tax Appeals concerning such assessments, all in such form as the Attorney-General may require."

6. On August 8, 1941, the District Court upon application of the Trustees, having considered the statutory offer of settlement, authorized the Trustees of the debtor to accept the compromise of said tax claim by agreeing to pay the full unpaid balance of the principal amount of taxes assessed from 1932 to 1940 inclusive, viz., the principal of $13,438,669.19, said payments to be made in installments [fol. 432] over a period of twenty years, as authorized by said Act, without penalties but with interest at 3% per annum, computed from December 1, 1940, as required by the terms of the said Act.

7. The Trustees thereupon made the payments, filed with and delivered to the appropriate officer of the State, all documents including requests for discontinuance of pending appeals and a waiver of all right to contest the validity and amount of any assessment made prior to December 1, 1941, as required for full compliance by them and subsidiary companies with the conditions of the offer of settlement and the order of the Court.

8. After all this had been done, and on September 4, 1941, the Attorney General, David T. Wilentz, instituted a proceeding in the Court of Chancery of New Jersey against the State Treasurer, attacking the constitutionality of Chapter 290. Neither the Debtor nor the Trustee nor in fact any railroad was a party to this suit in the Court of Chancery.

9. While the suit instituted by the Attorney General against the State Treasurer (Wilentz *v.* Hendrickson) hereinbefore mentioned, was still pending and undetermined, the Legislature enacted Chapter 169, P.L. 1942, which became effective May 8, 1942, amending certain provisions of Chapter 291, P.L. 1941 so as to levy a retroactive franchise tax against the debtor for the preceding year 1941 in the additional amount of $239,749.80. Said law also operated to reduce the franchise taxes assessed for 1941 against most of the other railroads operating in New Jersey and completely to eliminate from franchise taxes certain other railroads operating in New Jersey. Your petitioner believed at that time and still believes that said chapter arbitrarily and unjustly discriminated as between railroad taxpayers subject to the [fol. 433] Railroad Tax Act of the State and resulted in singling out the debtor as a victim of an arbitrary recomputation of the 1941 franchise taxes while at the same time financially benefiting other railroad taxpayers.

10. Thereafter the Legislature of New Jersey enacted Chapter 241, P. L. 1942, approved and effective May 21, 1942, amending in various respects Chapter 290, P. L. 1941, (the Tax Settlement Act). Chapter 241 added various burdens and conditions to those imposed upon the debtor by the Act which it amended. Among other things it provided that:

> "taxpayer desiring to accept the provisions of this act shall, on or before June 15th nineteen hundred and forty-two, file with the State Treasurer the acceptance document required by this act . . . waiving any and all rights to contest the legality or amount of any assessment on its property used for railroad purposes made prior to December 1st, nineteen hundred and forty-one, pursuant to the applicable tax acts and of any assessment heretofore or hereafter made for the tax year nineteen hundred and forty-one. . . ."

11. To accept the benefit of the 1942 Tax Settlement Act the Trustees were required unequivocally to abandon their challenge of the retroactive franchise tax for 1941 in the amount of $239,748.80, and to incorporate in their "Acceptance Document" their written waiver of "any

and all rights to contest the legality or amount" of said retroactive franchise tax assessment, and also any other tax that might thereafter be assessed for said year, or risk the contention that they had abandoned their acceptance of the State's offer or had failed in any respect to comply therewith in good faith. The Trustees were also required by Chapter 241 to make an additional interest payment on or before June 15, 1942 in an amount exceeding [fol. 434] $340,000., which resulted from the requirement of accelerated payment of interest and the requirement that interest be computed from December 1, 1940 upon the entire principal amount of taxes claimed by the State as of that date, without deducting therefrom the first installment of principal previously tendered in the form of a certified check which was then and still is in the custody of the State Treasurer. The Trustees had only between May 21, 1942 and June 15, 1942 to secure court approval of the acceptance of the settlement contained in Chapter 241, P. L. 1942, and to comply therewith. This approval was obtained, and the Act was fully complied with by the Trustees.

12. The same day that said Chapter 241, P. L. 1942, was approved by the Governor, the Court of Chancery granted an order to show cause with an ad interim restraint restraining the State Treasurer from carrying out or executing any of its provisions.

13. After the Trustees had complied and had caused their four affiliated companies to comply with Chapter 241, P. L. 1942, and had in good faith and in accordance with the terms of the order of the District Court Waived all their rights of contest as to taxes assessed prior to December 1, 1941 and had paid without contest the retroactive franchise tax of $239,748.80 and the additional and accelerated interest, hereinbefore mentioned, the Court of Chancery on September 8, 1943, entered its final decree in the case of Wilentz *v.* Hendrickson, 133 N. J. Eq. 447. In his opinion in that case the Vice Chancellor held the Railroad Tax Settlement Acts were unconstitutional, being violative of Article I, Paragraph 20 of the State Constitution, which provides:

> "No donation of land or appropriation of money shall be made by the State or any municipal corpora-

[fol. 435] tion, to or for the use of any society, association or corporation whatever."

14. The State Treasurer appealed the decision of the Court of Chancery against him to the New Jersey Court of Errors and Appeals which on June 22, 1944, filed its opinion affirming the decree of the Court of Chancery on the ground that the remission, cancellation and abatement of the delinquent interest was not supported by a legal, equitable or moral consideration.

15. The order of the District Court which directed the Trustees of the debtor to comply with the provisions of Chapter 241, P. L. 1942, on or before June 15, 1942, also fixed and determined the amount of the State's claim for taxes. The Attorney General of the State appealed from this order to the United States Circuit Court of Appeals and that court reversed so much of the order as determined the amount of taxes due the State of New Jersey but the court said:

> "One final point must be noticed. Order No. 163 authorized the trustees of the debtor to comply with the Tax Settlement Acts by executing and filing the documents and making the payments therein re-quired. Since the law directed that these steps be taken on or before June 15, 1942, it is vitally important to the debtor, in case the constitutionality of the Tax Settlement Acts is ultimately sustained, that the tenders made by the trustees prior to that date, pursuant to the directions of Order No. 163, be not invalidated by the reversal of that order. Accordingly so much of paragraphs 6 and 7 of Order No. 163 as authorizes the trustees to comply with the requirements of the Tax Settlement Acts will not be disturbed."

[fol. 436] 16. The cause was remanded "with directions to the District Court to wait the determination by the Court of Chancery of the State of New Jersey of the constitutionality of the Railroad Tax Settlement Acts, unless it finds that delay which may be harmful to the debtor and its creditors may result, in which event it may proceed itself to hear and decide the constitutional issue."

17. The Trustees filed their petition to the Supreme Court of the United States for writ of certiorari to review

the decision of the United States Circuit Court of Appeals but the Supreme Court denied certiorari.

18. Within two months after the decision of the Court of Errors and Appeals in Wilentz *v.* Hendrickson, to wit, and on or about August 12, 1944, the Trustees filed with the District Court their petition entitled "Petition for Adjudication Concerning New Jersey State Tax Claims." In said petition they raised, among other questions, (1) whether there had been a valid contract of settlement between the Trustees and the State of New Jersey, (2) the nature and extent of the State's lien, if any, against the properties of the debtor, (3) what interest or penalties if any had accrued on the State's taxes since the petition herein was filed, all of which questions your petitioner alleges are within the sole jurisdiction of the Bankruptcy Court and are questions which the Bankruptcy Court must decide. Upon being served with the petition for adjudication of the trustees, the Attorney General on behalf of the State filed a special appearance and objected to the petition being entertained by the court on the ground that it constituted the prosecution of a suit, claim or demand against the State, and moved to dismiss the petition insofar as it prayed for an adjudication or determination that the claims for taxes are less than the sums assessed against the debtor, and insofar as the liens of the State for such [fol. 437] taxes and interest are sought in any wise to be altered, affected, modified or destroyed by any such adjudication or determination. Upon the filing of the said special appearance of the Attorney General and after a hearing held October 16, 1944, this court, on motion of the Trustees, made its Order No. 250

> "That all tax claims filed by the State of New Jersey, the Trustees' objections thereto and the State's reply to said objections, and also the aforesaid purported special appearance of the State objecting to the jurisdiction of this court filed herein on August 28, 1944 be and the same are hereby referred and re-referred to Augustus C. Studer, Jr., Esq., as Special Master, for hearing and report thereon."

The Special Master on January 17, 1945, filed an interim report in which he reported that in his opinion the Bankruptcy Court is the proper court to determine the validity

and amount of the tax claims of the State and the incidential liens alleged to affect the property in the custody of the court. He concluded with the statement:

> "It is the opinion of the Master that the claim of the State to sovereign immunity should be denied and that the petition of the Trustees should not be dismissed."

Objections were duly made to the said interim report by the Attorney General and from Order No. 271, dated March 5, 1945, overruling the objections of the State to the interim report of the Special Master the Attorney General appealed to the United States Circuit Court of Appeals. The United States Circuit Court of Appeals on November 15, 1945, decided that Order No. 271 of the District Court should be reversed and held that

> "the only matters left open for the Bankruptcy Court to pass upon are (1) Mathematical error in the com- [fol. 438] putation of the amount of the tax, or (2) Legal error in its assessment • • •".

On March 19, 1946, petitioner filed his petition for rehearing. Said application for rehearing was denied on March 29, 1946.

19. Your petitioner's counsel at the present time is engaged in the preparation of a petition to the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Circuit Court of Appeals filed November 15, 1945, as aforesaid. It is expected that said petition will be filed before April 22, 1946, and your petitioner is hopeful that the Supreme Court will act on his petition for such writ before the adjournment of the Court in June.

20. Since the decision of the United States Circuit Court of Appeals on November 15, 1945 the Attorney General of the State of New Jersey has urged your petitioner as Trustee and the bondholders committees represented in the proceeding to pay a substantial part of the taxes alleged by the State of New Jersey to be due it under its said claim. At a conference between your petitioner and his counsel and the Institutional Group Bondholders' Committee and their counsel it has been decided that your peti-

tioner should apply to the District Court for instructions as to whether he should at this time pay an amount approximately equal to the principal amount claimed by the State of New Jersey in its said proof of claim for the years 1932 to 1939, inclusive, to wit, $12,117,450.68, plus the sum of $1,321,218.51 being an amount approximately equal to the principal amount of unpaid taxes claimed by the State for the year 1940 or a total sum of $13,438,669.19, or such other sum as the Court may direct, it being the opinion of all of the parties, including your petitioner, that such amount should now be paid to the State as will approxi-
[fol. 439] mate the total amount that is due to the State if the Settlement Acts are ultimately held to be valid as to the Debtor's Estate.

21. Your petitioner calls attention to the fact that in the effort to strictly comply with the conditions specified in the Tax Settlement Acts, the Trustees paid or tendered to the appropriate State officer in the form of certified checks on the dates shown in Exhibit "A" attached hereto the several amounts specified in said exhibit.

22. Your petitioner has sufficient funds in hand at the present time with which to make the payment proposed in paragraph 20, in the event that the court orders the same. Your petitioner, however, is informed and verily believes that the moneys which he has in hand at the present time out of which taxes would have to be paid are moneys derived largely, if not entirely, from assets and earnings to which the State's lien does not extend.

23. Your petitioner desires to point out that in the event that the Supreme Court of the United States should allow your petitioner a writ of certiorari and should later decide that there is a valid and existing contract between him and the State of New Jersey, your petitioner by making the payment specified in paragraph 20 hereof would lose one of the benefits of such contract, viz., the privilege of making payment in installments over a period of years.

Your petitioner therefore prays that an order may be made instructing him whether he should at this time pay out of the funds in his hands to the State of New Jersey the sum of $13,438,669.19 or some other sum in such way and manner as will protect the debtor's estate and stop the
[fol. 440] further running of penalties and interest on the

amount so ordered paid, and that he may have such other and further relief as in the premises may seem equitable and just.

Walter P. Gardner, Trustee, Petitioner.

(Verification dated April 15, 1946, omitted in printing.

[fol. 441] EXHIBIT A

Tax Tenders to the State of New Jersey by Trustees of The Central Railroad Company of New Jersey

Date of Tender	Amount of Tender	Division between Principal and Interest if Applied Under Settlement Acts		Checks Retained By State
		Principal	Interest	
August 11, 1941	$ 951,872.83	$ 671,933.46	$ 279,939.37	Yes
June 15, 1942	590,816.69	250,000.00	340,816.69	Yes
December 1, 1942	1,000,000.00	825,758.75	174,241.25	Yes
December 1, 1943	1,035,000.00	680,489.42	354,510.58	Yes
December 1, 1944	1,015,000.00	680,885.07	334,114.93	No
January 2, 1945	3,079,184.94	3,051,683.49	27,501.45	No
December 1, 1945	900,000.00	701,035.66	198,964.34	No
Total	$8,571,874.46	$6,861,785.85	$1,710,088.61	

The separations shown above between principal and interest are not specified in the Court orders, authorizing these payments, nor were they set forth at the time the payments were made, but merely represent our calculations as to how these payments apply.

All of these payments except the payment on January 2, 1945, were tendered solely under the provisions of the Settlement Acts. The January 2, 1945, payment was tendered under the provisions of the Settlement Acts, with the alternative condition that, if the Settlement Acts should ultimately be held invalid as to the Central Railroad of New Jersey, these payments would then be applicable to the principal amount of taxes due for the years 1932 and 1933.

April 13, 1946.

[fol. 442] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 29,778

Order No. 333 Authorizing and Directing Trustee to Make Payment on Account of Taxes Claimed by State of New Jersey

This cause coming on to be heard pursuant to order entered herein on April 16, 1946, and it appearing to the

Court that due notice of said order and of the hearing thereon has been served as said order directed and the Court having reviewed the record and having heard the parties and being fully advised in the premises, it is

Ordered, Adjudged and Decreed:

1. The Trustee is hereby authorized and directed to pay to the State of New Jersey within 10 days the sum of $15,250,000.00 in cash on account of tax claims of the State of New Jersey for the years 1932 to 1940, inclusive, including interest thereon, if any, said payment to be made upon the following conditions, to which the State of New Jersey, by acceptance of said payment, shall be deemed to have expressly assented:

(a) in the event that the claims of the State of New Jersey shall be finally determined to be an amount [fol. 443] greater than said payment, said payment shall be deemed to have been applied in satisfaction of said claims, as finally determined, for each of the years commencing with 1940 and extending back through each of the preceding years and portion thereof that said payment shall be sufficient therefor, *provided* that with respect to any year for which such payment shall be sufficient to satisfy only a portion of the claim the application shall be deemed to have been made ratably as between the principal amount of the tax and the interest thereon, at the rate finally determined, computed to the date of said payment; and provided further, that if it shall be finally determined that this Court may direct the application of said payment solely to the satisfaction of the principal amount of said claims, the application of said payment shall be deemed to have been made solely in satisfaction of said principal amount;

(b) in the event that the claims of the State of New Jersey shall be finally determined to be an amount less than said payment, the amount of such overpayment shall be credited by the Treasurer of the State of New Jersey upon the taxes next legally levied and payable to the State of New Jersey, subsequent to such determination, by the Trustee or the Debtor or any successor in title to substantially all of the properties of the Debtor located in the State of New Jersey;

(c) in making said payment the Trustee may, in his discretion, use the funds represented by certified checks in the aggregate amount of $3,577,689.52 payable to the Treasurer of the State of New Jersey, and tendered to said Treasurer pursuant to Orders Nos. 123, 163, [fol. 444] 178 and 216 entered herein, and for that purpose may regain possession of and surrender said checks for cancellation, without prejudice to effectiveness of said tenders or any other tenders or the legal consequences that may be found to have ensued therefrom.

2. Except as otherwise provided in paragraph 1 of this order, the making of said payment by the Trustee and the acceptance thereof by the State of New Jersey shall be without prejudice to the rights of or the positions asserted by either of them or any party hereto in litigation now or hereafter pending relating to said claims of the State of New Jersey. Guy L. Fake, United States District Judge.

Dated: April 26th, 1946.

The making and entry of the foregoing order is hereby approved.

Walter D. VanRiper, Attorney General of New Jersey, by Benj. C. Van Tine, Deputy Attorney General.

[fol. 445] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor

Bank 29,778

Hearing on Petition of Trustee for Order 333 Giving Instructions Regarding Payment of Taxes to State of New Jersey Newark, N. J., April 26, 1946.

Before: Hon. Guy L. Fake, U. S. D. J.

APPEARANCES:

Walter P. Gardner, Trustee.

James D. Carpenter, Jr., Attorney for Trustee, and Samuel M. Coombs, Jr., representing Trustee.

Alexander H. Elder, General Solicitor of The Central Railroad Company of New Jersey, representing The Central Railroad Company of New Jersey.

Walter D. Van Riper, Attorney General of the State of New Jersey, and B. C. Van Tine, appearing specially, representing the State of New Jersey.

[fol. 446] Charles Hershenstein and Milton B. Conford, appearing specially, representing the City of Jersey City.

Rathbone, Perry, Kelley and Drye, by Frank H. Heiss, representing Central Hanover Bank and Trust Company, mortgage trustee.

Fred N. Oliver, Blair Reilly, Willard P. Scott, and Joseph W. Kenna, representing Institutional Group of Bondholders.

Russell M. Van Kirk, pro se.

Mr. Carpenter: If your Honor please, I would like at this time to file proofs of publication of the order to show cause made by your Honor and proof of mailing of that order to show cause.

The Court: They will be marked in evidence.

(Exhibits T-1 and T-2 marked in evidence.)

Mr. Carpenter: If your Honor please, this is the return day of an order to show cause why the Trustee, Judge Gardner, should not be instructed whether to make a payment to the State on account of taxes, and if so what amount of taxes.

The facts are pretty well contained in the petition of the Trustee that was mailed to all of the creditors who have appeared in the proceeding, the bondholders' committees, to the State and to the principal stockholders; at any rate those who have appeared in the proceeding, as well as to the corporate trustee. The corporate trustee has filed an answer, as have the bondholders' committees.

I understand the corporate trustee wishes to introduce some evidence and I think this is perhaps the appropriate time for that to be done.

Mr. Van Tine: If your Honor please, before we get [fol. 447] under way may I have it noted on the record that in as much as the jurisdictional question is still pending now before the United States Supreme Court, that the State is here appearing specially, without waiving its rights under its jurisdictional question.

Mr. Carpenter: I wish to state that the State has no right to appear in this proceeding to enter a special appearance, if it is in the proceeding it is in generally.

It was in generally many different times in these proceedings, and being a claimant in these proceedings, with a claim on file, it cannot appear specially.

The Court: I will allow them to appear, reserving the question you raise until a later time.

Mr. Carpenter: There is one other thing I should advise the Court that is not set forth in the petition, and that is the petition recites that the Trustee was preparing a petition for a writ of certiorari to the Supreme Court. I should advise the Court that last Saturday that petition was filed with the Clerk of the Supreme Court and on Monday it was served on the Attorney General.

Mr. Van Tine: May I just reply to Mr. Carpenter and state that any so-called general appearance in the past was without authority and under the decisions of the Ford Motor Car Company against the Indiana Treasury Department, which was decided, I think, just about a year ago, even when the jurisdictional matter or objection has been raised before the United States Supreme Court for the first time, that is soon enough and we stand on that jurisdictional objection.

Mr. Heiss: Your Honor, before I call my witness to introduce some evidence I would like to state briefly the nature of the answer which has been filed by the Mortgage Trustee and the nature of the evidence which I plan to introduce.

It appears to us that a rather serious question is raised with respect to the rights of the bondholders under the General Mortgage of the Debtor by the application which [fol. 448] has been filed by the Debtor's Trustee in that the funds from which this tax payment, or payment of taxes, will be made consist of funds upon which the Debtor's General Mortgage constitutes a first and only lien, and that those funds are not subject to any lien of the State to secure the taxes in question, which are taxes which accrued prior to the institution of the bankruptcy proceedings.

We believe that to be the case not only because the statutes of the State of New Jersey as they existed at the date of the institution of this proceeding did not purport to impose any lien upon income or revenues of

the Debtor but only upon the tangible property of the Debtor in the State, but also because even if the amendment of the State statute which as enacted in 1941 which purported to impose retroactively a lien upon revenues as security for past due taxes, even if that statute is effective, which I doubt, an allocation of revenues and expenses as between the property of the Debtor in New Jersey and the properties of the Debtor outside of New Jersey will show that there have been no net revenues from the operations of the property in New Jersey, or almost none, that all, or the greater part of the revenues, and that all, or the greater part of the cash on hand have arisen from the operation of the Pennsylvania portion of the properties.

That being so any cash which is paid out, or which is available for being paid out at this time, is bondholders' cash that is held by the Trustee for the account of the bondholders, subject to such necessary expenditures as may be required in order to maintain the service of the road.

The only reason which would justify the paying of those monies not to the bondholders but to some other party would be that it would be in the interest of the bondholders to do so, that is, it would be in the interest of the bondholders to use this cash fund to redeem the [fol. 449] New Jersey properties from the lien which the State alleges that it has upon those properties.

Now, in the answer which we have filed we have brought those facts to the attention of the Court, in spite of the fact that the bondholders' committees represented here all favor this proposed tax payment. We believe it was our duty to bring these matters to the attention of the Court and call the Court's attention to the fact that before making the payment it must consider whether it is in the interest of the bondholders to take cash funds otherwise available for them and use them to redeem the Jersey properties.

Now I would like to call Mr. Wyer.

WILLIAM WYER, being duly sworn, testified as follows:

Direct examination.

By Mr. Heiss:

Q. What is your position with the debtor company, Mr. Wyer?

A. I am the Chief Executive Officer.

Q. And how long have you occupied that position?

A. Since July first, 1943.

Q. And as such are you familiar with the operations of the Debtor?

A. I think so.

Q. Have you, prior to your association with the Debtor, Mr. Wyer, had experience in relation to problems of the determination of the earning power or the segregation of the income and expenses of railroads in process of reorganization as between different parts or divisions of the railroad lines?

A. Yes, I have had a great deal of experience of that type. I have made such studies myself, or under my immediate supervision, and when I say that, I mean that the studies were made by a staff of my own firm, on the Seaboard Airline, the Denver and Rio Grande Western, the Central of Georgia, Florida East Coast, and I have been—[fol. 450] I should add to that the Alton Railroad—and I have been very closely in touch with and have examined in great detail and analyzed similar studies made on the New Haven, Erie, The Missouri Pacific and some others; and I also made such a study on the Central Railroad of New Jersey.

Q. Would you explain just very briefly and generally what the nature of such a study is?

Mr. Van Tine: If your Honor please, may I object to the materiality of these questions unless they are limited to the one question of whether or not you should at this time permit the payment of money. In other words, if there is an intent to create an issue on facts outside of the present petition, that is, in the present prayer, which is to permit the payment of money, then I shall object to it as being improper and not within the purview.

Mr. Heiss: I will be very happy to agree to such a stipulation.

Mr. Carpenter: If your Honor please, this is a trustee's prayer for instructions and I think it is for the trustee, within his rights, to advise the Court of all facts.

The Court: I can't tell what the witness is about to testify to and therefore cannot pass on any objection now.

Proceed.

Mr. Van Tine: Could we stipulate that the limit for which any of this testimony is to be used is for the purpose of helping you to determine whether at the particular time you should pay any amount of money to the State of New Jersey and for no other purpose?

The Court: That is correct isn't it?

Mr. Heiss: I think that is quite clear; from the purpose of the hearing nobody would consider it otherwise.

[fols. 451-480] The Court: Yes.

Mr. Van Tine: It is so stipulated?

Mr. Heiss: I will so stipulate.

* * * * * * *

[fols. 481-488] My last exhibit, CH-10, is headed "Elements of Value of the Physical Property of The Central Railroad Company of New Jersey Based upon Interstate Commerce Commission Calculations," and are shown there, the basis of these figures.

These are sometimes incorrectly referred to as Interstate Commerce Commission valuations. The Interstate Commerce Commission does not keep its valuation, as such, up to date. These are more properly described as elements of value and they are arrived at on the basis shown here.

On this basis the fixed property in New Jersey is valued at $123,248,161 and the equipment, allocatable to New Jersey, at $36,093,044, or a total of a little over $159,000,000.

Then the property owned and leased in Pennsylvania, including equipment owned and equipment leased by the Central Railroad of Pennsylvania, has a value on this basis of over $52,000,000.

And the property in New York owned and leased, mostly owned, including equipment, a value on this basis of a little over $5,000,000.

I think that concludes my discussion of these exhibits.

Mr. Heiss: I have no further questions of the witness, your Honor.

Mr. Oliver: Before you cross examine may I ask Mr. Wyer a question for information? This is not cross.

. . . . . .

[fol. 489] Mr. Carpenter: If your Honor please, I would like to state what the position of the Trustee is. The Trustee, of course desires to reduce in every proper way the [fol. 490] running of interest and penalties against this estate. He is prosecuting a petition to the Supreme Court for a determination which he has never been able to get secured, whether or not this road owes to the State of New Jersey the principal of its taxes payable on the line or whether they are payable over a period of years in accordance with the Settlement Acts of '41 and '42. There has never been a determination whether this estate is liable for interest as fixed by the tax settlement acts at three per cent or whether it is liable for this penalty of 12 per cent or one per cent per month. The State contends that is interest; the Trustee contends it is principal. Now, that question will have to be decided.

The Court: The Trustee contends it is penalty.

Mr. Carpenter: Yes—or a penalty, yes. The State contends it is interest. Now, that question has to be determined.

If it is determined under state law it is 12 per cent per annum, beyond any doubt it is reflected in Wilentz against Hendrickson and Jersey City against Van Riper.

If that is restricted by a law it may very well be that if the Settlement Acts are held unconstitutional by the Federal system the Court may say because of the long period of time it has been in litigation it would be inequitable for the estate to pay three or some other per cent of interest.

Now, the bondholders, after all, are most interested in this situation. The Trustee wants to perform his duties looking at the interest of all parties. He has asked for instructions of the Court. Now, the bondholders are represented here, there are representatives here of some stockholders and I think your Honor should listen to them and all we ask is that such an order you make preserve the [fol. 491] rights of the Trustee to have determined in this litigation now pending by the Federal Court how this money, whatever it is, shall be applied, whether it shall be applied to the payment of principal or partly to the payment of principal and partly in payment of the interest.

I suggest for your Honor's consideration that you determine whether or not in making this order that you feel bound to make that application in accordance with a decision of Judge Oliphant's in the State court, when you don't determine this claim being filed here money being paid out of the funds in the control of this court on this court's authority, you shouldn't determine how it should be paid and how it shall be applied.

Mr. Oliver: If your Honor please, may I suggest that it might be helpful to all of us to hear anyone who is opposed to the payment so we will know what argument is to be met.

The Court: Does anyone oppose?

Mr. Van Kirk: I would like to be heard, your Honor.

My name is Russell M. Van Kirk and I own personally a very substantial amount of Jersey Central 5 per cent bonds.

The Court: What is the amount?

Mr. Van Kirk: $740,000, and I represent about $2,100,000 of friends of mine who own bonds like I do.

I have listened with a great deal of interest this morning to Mr. Wyer's testimony and it is my opinion that inasmuch as the Court is looking after the interests of the Debtor, before the Court rules as to how much money shall be paid to the State of New Jersey in taxes and interest that the bondholders be given the right to vote as to whether or not [fol. 492] they wish to be relieved of the burden of the New Jersey properties.

In other words, your Honor, I think that a vote of the bondholders who, after all, are the creditors of this company, would determine adversely the fact that they do not wish to continue the New Jersey properties. In other words, the State of New Jersey is taxing us, along with penalties, a total amount of some $31,000,000.

Now, inasmuch as the railroad for the past ten years, even during a war period at which time railroads made good money, the properties in the State of New Jersey were operated at a loss with the exception of two years. The sum of twenty-six million odd dollars cash that the Central has today has been derived from earnings of properties outside of the State of New Jersey and that is money which the bank trustee will testify actually belongs to the bondholders.

Now, the question for the Court to decide is: are the properties in the State of New Jersey worth $31,000,000? If they are not then the Court, in my humble opinion, should not penalize the bondholders by paying out thirteen million or twenty million, or whatever amount the Court decides should be paid.

In other words, your Honor, I feel that before you do anything that the bondholders, who are creditors, should have the right to vote as to whether or not they wish to retain the New Jersey properties, and if they do then I am agreeable for one to pay whatever amount the railroad can legitimately pay.

But I think it would be a grave mistake today for you to decide to pay out any amount of money until the decision is reached as to whether or not the Jersey properties are worth any amount like $31,000,000.

[fol. 493] In addition, your Honor, Mr. Carpenter, the Trustee's attorney, is about ready, I believe, to present to the United States Supreme Court a petition for a writ of certiorari which, if it is acted favorably upon, the railroad and the debtor will be in a much better position than they are at the moment.

I respectfully suggest that you make no decision until Mr. Carpenter's petition has had a reasonable time to be heard.

Thank you very much.

The Court: Is there anyone else in opposition?

(No response.)

The Court: Apparently not.

Mr. Conford: If the Court please, I am not in opposition and I don't think the Attorney General is, but I would like to be heard on the form of the order and I think the Attorney General would.

The Court: Yes, I will hear you on the form of the order.

Mr. Van Tine: I would like to urge upon the Court the payment of the money and explain why when I have an opportunity.

The Court: I will give you that opportunity now.

Mr. Van Tine: If your Honor pleases, I came in this case just about a year and eight months ago. I think in the very first conference I had with you in the early part of September, 1944, I urged upon you the urgency of this matter.

The Court: Just let me correct you. I urged it first.

Mr. Van Tine: I believe, if your Honor pleases, you did call a conference.

The Court: And the conference was for the purpose of making a payment, if the Court could, to avoid penalty.

[fol. 494] Mr. Van Tine: That is correct.

Now, in that time, if the State of New Jersey is correct, there has accrued against this estate an additional $2,500,000 in interest.

Now, let's forget the word "penalty". You can't get around the fact that our Act says "interest". It has always said "interest". There is another provision for penalty in our Act and it comes squarely within the rule of the Amoli case, which was presented to your Honor even before I came into this case.

Now let's take the history of this case. In 1932 and 1933 this taxpayer, this debtor, defaulted on its taxes to the State of New Jersey. There was litigation in the New Jersey courts resulting in what is the modern rule laid down in the Central Railroad case reported in 114 New Jersey Law at page 69.

Now, they were not content with going through our courts and into the United States Supreme Court, as they had done with the 1931 tax, wherein the United States Supreme Court had refused certiorari, but instead they went this time to Judge Forman for an injunction and ultimately the United States Circuit Court of Appeals said the whole matter had been made res judicata by the Central Railroad case I mentioned before in 114 New Jersey Law. And the United States Supreme Court again refused certiorari.

Now, according to that petition and according to the petition just filed with the United States Supreme Court for certiorari in the latest McLaughlin opinion, they state that the reason they went into bankruptcy was because of this tax that the State of New Jersey was now seeking to enforce by the statutory proceeding.

[fol. 495] It is inconceivable to me how anyone could have, with the power now to issue receiver certificates and with no more litigation pending, with the United States Supreme Court having refused to review the matter of the validity of these assessments, that they should not have immediately paid with receiver certificates, which your Honor knows at that time could have been issued for less than two per cent, but instead with a studied stubbornness and an

obstinacy, a blind obstinacy, that is unparalleled in the history of any proceedings in this court, they refused to pay.

There was no possibility that they could go anywhere else and say that these taxes were less. And yet they allowed this money to accumulate, or allowed this interest to accumulate. Maybe for the next 12 months there was some reason why they should, although on the theory of res judicata I don't see how. But the fact was that for the '34, '35 and '36 cases Judge Forman had granted an injunction and that was pending.

Maybe they thought that not only would a miracle happen with reference to '34, '35 and '36 but maybe it would be retroactive. Maybe there was some reason.

But in 1940 the United States Circuit Court of Appeals said that this whole matter of the '34, '35 and '36 taxes had been made res judicata by the determination in the 1933 tax case. And your Honor did not in that case, in 1940, allow them to go to the United States Supreme Court. As a matter of fact, both your Honor and Judge Clark in the Susquehanna receivership said that you would not permit it. Judge Clark said, "I insist upon a proscription of futility."

Now, there is no doubt that in 1940 they should have gone out again but instead they allow this interest to accumulate [fol. 496] at 12 per cent a year instead of borrowing on receivership certificates at one or two per cent. They can't say they knew about any Settlement Acts because the Settlement acts weren't passed until July 22nd, 1941. Maybe they had hopes. Maybe hope does spring eternal in the human soul. However, these were trustees charged with responsibility not only to this debtor but to the State of New Jersey. And I say to your Honor with due deference and humility that when these people held from our taxpayers this money—or from our taxing authorities this money through all this period they did a grave injustice to the State of New Jersey and under the rule laid down in Boteler against Ingels reported by the United States Supreme Court in a Chicago and Northwestern case, the case out in the Seventh Circuit, a reorganization case, and the Davey case, there is no doubt that it is the trustees' charge and it is their responsibility to pay every penny of interest that is accumulated and accrued since the 30th day of October, 1939. There is no doubt about it.

Fiat justitia, ruat caelum; there is no doubt about it.

We are here in a court of equity and the spectacle of this court holding us at arm's length denying us the right to use our money and at the same time to say, "It isn't yours, Mr. State of New Jersey, it belongs to somebody else," is a principle that will never be established in a court of equity.

So I say to your Honor that there has been in this case an awful lot of complaint against the State of New Jersey which is unjustified. Every bit of the responsibility in this case must be placed directly in the hands or at the feet [fol. 497] of the trustees and their counsel who have been in charge of this reorganization.

Now, if your Honor pleases, there is no doubt that on the record here there is available for payment to the State of New Jersey $1,670,000, approximately $1,700,000, if we use the checks that are present in the State of New Jersey—held by an individual in the Treasurer's Office in Trenton.

Now, if your Honor pleases, you will remember that I have told you from the very beginning that we should stop the running of interest in this case and it could be done by a payment of any particular year, and forgetting if you will the Oliphant rule, the Erie rule, there never has been any law in the State of New Jersey which does not permit the railroad taxpayer to have picked out any one of those years.

The only time that the Oliphant formula and rule applies, if you want to pay less than the whole tax debt of a particular year.

Now, I offer to take from this court any amount of money that the Court wishes to pay upon the account of this debt. I have sat in many conferences with this Court and the various representatives of the several parties in interest. It was my understanding when your Honor went away on your vacation that the thing had given you such tremendous worry that you wanted us to sit down and have ready for Honor a rule to show cause returnable the first day that you returned paying to the State of New Jersey an amount of approximately $22,000,000. You asked the Trustee before you went whether or not that amount was available and you were informed that this Debtor could pay that amount of money.

Now, we are willing to take any amount of money that [fol. 498] this Court wishes to pay to us. We believe that

in justice to the State of New Jersey, we believe that in justice to this Debtor, itself, you should make a substantial payment because if $16,000,000 should be paid at this time and it is properly applied at least $800,000, and maybe $1,000,000 of interest will be saved on this particular running of interest.

The Court: Are you willing to accept payments of sums of money which would total principal and interest for a year or a series of years under which it would be clear that the payment is made under protest and subject to the right of this taxpayer to the protection of the statute, 54: 29A-29, which you are familiar with, which provides that,

"Any taxpayer may pay the amount of an assessment into the State treasury, notwithstanding litigation may be pending as to the validity of the whole or any part of said tax, and if it shall be determined in any litigation that the whole or any part of the tax so paid has been unlawfully assessed or imposed, the State Treasurer shall give credit for such overpayment to the taxpayer so paying, upon the taxes next legally levied and payable into the State treasury subsequent to the determination of any such litigation."

That is found in Public Laws 1941, Chapter 291.

Mr. Van Tine: We are willing to accept it on that term, yes, sir.

The Court: I just wanted to know.

Now, then, I would like to ask— Do you want to be heard?

Mr. Hershenstein: No.

The Court: I want to ask a question of those in favor [fol. 499] of the payment. There is a figure mentioned in the petition, $13,438,669.19. How is that total arived at?

Mr. Oliver: That amount is the Trustee's figure but I understand it is an amount equivalent to the principal amount of taxes.

Mr. Carpenter: I can answer that. That is the principal amount of the taxes as shown in the claim filed by the State.

The Court: Well, now, by the paying of that there would not be any protection against the running of penalties would there?

Mr. Carpenter: That is the trouble. Now, the State hollers so about not having been paid this money, they don't say don't tell your Honor that the trustees have

tendered to the State over $8,000,000 but the State can't accept it because of the authorities, Wilentz against Hendrickson and on the Oliphant theory because they——

The Court: You know that the $8,000,000 offered the State on principal was refused by the State?

Mr. Carpenter: The State has consistently refused to apply it to principal.

The Court: Well now they say they are willing to accept it, or any sum; reserving to the Trustee a right to the protection of the statute that I have just read.

Mr. Carpenter: If your Honor please, I do not consider that statute is a sufficient protection to this court and its trustee.

The Court: Why?

Mr. Carpenter: Because it doesn't apply to this situation, these taxes. It can't be contended that these taxes are unlawfully assessed or imposed.

The Court: Why can't it if you claim that the sum total of each year comprises a fund made up of penalty, as [fol. 500] you call it, and the tax itself? Always through these proceedings the attacks have been made upon the interest as being penalties. If we were to pay the different years what years are there that this would total up to, '32 to '39?

Mr. Carpenter: The $13,000,000 covers the principal taxes to 1932 to 1940, inclusive.

The Court: To 1940, inclusive. Without any payment of interest?

Mr. Carpenter: That's right. Now, if we could pay that to the State and thereby stop the accuring of any further penalty——

The Court: If you paid that that would not stop the running of interest, would it?

Mr. Van Tine: Not all of it. If the court should ultimately determine that all the state had coming to it was $13,000,000 then of course it would stop the running of interest, but in the event it were determined that more than $13,000,000 were due, then it would become necessary to apply the amount of money——

The Court: What I would like to know, would it stop the running of interest on the amount that we deposit?

Mr. Van Tine: It would stop the running of interest on the part of that amount which would be credited to principal.

The Court: Well, now, the moment you get this money, the State gets this money, I assume it would credit it on interest——

Mr. Van Tine: No, if your Honor were to make an order to this effect, that——

The Court: —and if you did credit it on interest the interest on the principal would still be running.

Mr. Carpenter: Right.

Mr. Van Tine: If your Honor makes an order in this tenor: This amount is being paid upon the tax debt without [fol. 501] any determination as to how it shall be applied, without prejudice to any one of the parties to make any legal argument with reference to the applications or the amount due, provided, however, that in the event that an amount in excess of the $16,000,000 should be found to be due and payable, then the $16,000,000 will be applied toward the extinguishment of the total debt of those tax years which shall be determined by the Trustee and the bondholders—meaning that in that event if they pay the '40, '39, '38, '37, and '36 taxes with that $16,000,000—and provided further that in the event that it should be determined that less than $16,000,000 is due and payable, then that the excess over and above that which was found to be actually due and payable would be credited to the next taxes, pursuant to that statute, and we will accept payment on such an order.

Mr. Conford: I would like to point, if your Honor please, —I think it has been attempted to be stated but perhaps it is not clear—there are two problems, as I see it before the Court. The first is the form of the order with respect to how these moneys should be paid and the second problem is how much should be paid. I think the understanding of the second one, how much should be paid, partially depends upon the first problem.

The Court: Well, my offhand view of it from the argument here, and I may not continue to have the same opinion after the argument is concluded, is that what I would like to do is to pay the amount that they suggest here and in addition thereto whatever amounts there are now in the hands of the State Treasurer. What is that?

Mr. Van Tine: Three million six.

The Court: Three million six.

[fol. 502] Mr. Conford: May I submit a thought?

The Court: Now, if three million six were added to the thirteen million, personally I would like it very much if that can be done and at the same time the Trustee can be protected on an issue which, gentlemen, has never yet been solved, notwithstanding all you have said, and that is whether or not in so far as bankruptcy is concerned that interest is a penalty. The question is still open.

And let me explain the reason why I say notwithstanding the decisions of the State courts: As you undoubtedly know, the law in so far as the Federal field is concerned is not as static as it was in former years, kaleidoscopic changes have taken place.

Up until a month ago I felt that the law was well established that the question as to whether a partnership existed was a question to be solved under Erie Railroad against Tompkins, by virtue of the law of the State.

The United States Supreme Court has now held that the law of the State has no application in a tax proceeding because it is for the Federal courts, themselves, to build up a corpus juris, which I think would be equivalent to the common law where taxes are concerned under the Revenue Act.

Therefore, Erie Railroad against Tompkins has no application in the case of a Federal tax.

Moreover, there is an opinion that just came down yesterday that Mr. Carpenter called my attention to—let me have that; have you got it here?—wherein the United States Supreme Court has held in a bankruptcy case that the law of the State is not to be followed. It seems to me as I read it that it is almost in conflict with the full faith and credit clause, but that doesn't seem to mean anything, either.

[fol. 503] It says, "In determining what judgments are proveable and what objections may be made to their proof, and in determining the extent to which the equitable conduct of a claimant in acquiring or asserting his claim in bankruptcy, requires its rejection or its subordination to other claims which, in other respects are of the same class, the Bankruptcy Court is defining and applying Federal, not State, law."

Now, if that is followed through to a final conclusion there can be no question at all but that this court, notwithstanding your penalty clause and your decisions in the State of New Jersey, would have the right to look at this tax problem

and solve it on the basis of equity and good conscience in the exercise of its equity power.

Therefore, these changes that have taken place, it has been because men who were well versed in the law realize the issues that are now pending before the United States Supreme Court.

And there is another one that I anticipate a decision on next week wherein it may well be if the Court follows the Lusthaus case, and which it has done in the case which I just stated, that the Court will come back in a bankruptcy case and say, "You will have exclusive jurisdiction," and pass upon whether 12 per cent is a penalty or interest where the interest has never been more than six per cent. It may be that the Supreme Court will say it is. It is my view they ought to if they follow what the Court has heretofore followed in regard to interpreting.

Here was a judgment in the case I have just read from and it had been fought out in the State courts on the ground that there had been no service of process and on the ground that the amount involved constituted a fraud. They went [fol. 504] through the State courts and they went through the Federal courts to have that judgment set aside, to no effect, and finally when bankruptcy supervened it went to the United States Supreme Court and there the whole subject was opened and the law of the State was cast aside.

Now, in the Tower case, handed down last month, the United States Supreme Court clearly holds that in the case of partnership income tax the law of the State means nothing because the Federal court will fix its own interpretation upon what a partnership is. All of which is contrary to the views that I have heretofore held, myself, but yet nevertheless that is the law and I will follow it.

Therefore, when you argue that this case has always been all one way you are greatly mistaken, the issues here have been controverted constantly from the beginning.

I will say this: that your case of Wilentz against Hendrickson certainly did repeal all the law there was prior to that time because the old New Jersey cases always held that interest on taxes, as distinguished from interest on a debt, were penalties. There are very strong dissents in this State take that very opinion. This isn't all one way.

Now for the first time we have an opportunity on an application for the writ of certiorari now pending to have the United States Supreme Court pass upon the question

whether or not this court has jurisdiction to pass upon the extent and validity of a tax claim or whether the court is bound by State decisions with relation thereto in bankruptcy. They have taken the first step against you, Mr. Van Tine, in this bankruptcy case when they look at judgment and construe it according to the bankruptcy idea and not [fol. 505] according to the law of the State. Now, I just say that to answer your proposition that it is all so simple; it isn't.

Now, what I would like to do——

Mr. Oliver: May we state our position, if your Honor please, so the record will disclose it, without argument at all?

The Court: Yes.

Mr. Oliver: I appear here on behalf of the Institutional Group, as you know, and I am always authorized to appear on behalf of the other two organized committees of bondholders, one known as the Brooks Committee, represented by Mr. William A. Roberts of Washington, D. C., and the other committee known as the Watters Committee of Bondholders, represented by Mr. Thomas Raeburn White of Philadelphia.

These three groups of bondholders join in asking that a payment be made on account of taxes. You know very well our position, you have known it for several years on that subject and I won't take your Honor's time to argue upon it.

I want to say that in connection with the presentation made by the Central Hanover, it is our feeling that on the question of a lien on cash it is not material here whether that cash be earned in Pennsylvania or whether it be earned in New Jersey. We have never thought that anyone seriously contended that the State had the first lien on that cash. But regardless of that the determinative question is whether or not it is the wise thing to do in the best interest of the property, to use this cash to pay a part of this prior lien against the property as a whole, and it is the judgment of our people, our own committee, composed of nine outstanding financial people, that it is the wise thing to do; and it is likewise the judgment of the other two committes.

[fol. 506] The Court: I would like to ask, Major, in that connection whether you favor the payment as it is set forth in the prayer of this petition or whether you favor a larger payment?

Mr. Oliver: Well, let me say this: For the purposes of this present proceeding we don't want to do anything which would embarrass Mr. Carpenter, counsel for the Trustee, in his petition for certiorari.

We have felt that if you make a payment equivalent to the principal due, which is about $13,400,000, plus an additional amount equivalent to three per cent interest since 1941, the date of the compromise act on that principal amount, which would aggregate, we believe, somewhere around $16,000,000, that such a payment would not prejudice the Trustee and ourselves in seeking to rectify the injustices caused by this heavy penalty because even though we succeed in all of our demands we would still owe the principal amount and I don't see how in good conscience we could avoid payment of the three per cent interest provided in the Settlement Act on that principal amount since the date of the Settlement Act. So if you paid $16,000,000, or approximately that amount, which it seems to me the Trustee can spare safely, then you will have done nothing to prejudice the counsel for the Trustee in his efforts to rectify what we believe to be injustices, and would also stop the running of interest on that amount.

Now, we suggest——

The Court: Well, it depends upon how the State would credit it.

Mr. Oliver: No, I think there is a very practical way of handling it, if your Honor please, and I think the State will probably agree to that method. I have not discussed the [fol. 507] matter with counsel for the Trustee or the State either, but what could be done, your order could provide that this amount would be payable on account and the allocation to be made in accordance with the final decision in the case.

The Court: Well, now, just a minute, just hold right there. It is after one o'clock and time to go to lunch. What you have just said seems to be a pretty good solution. May I suggest that you convene in chambers at two o'clock and draw an order and let it be passed around to counsel and see how near you can agree because what you just said as you closed is in agreement with Mr. Van Tine, who represents the State.

I would like to know whether anyone else has anything to offer?

(No response.)

Now, before I can get to a discussion on it I have to read the language of an order, and there is where the difficulty is in the fixing of an order.

I now rule that I intend and will recommend payment; the amount is open until the coming in of the presentation of an order after counsel have examined it, and then if there are objections to that order I will hear them. I want to finish this today, time is money in this case. Therefore, we will recess now and reconvene as soon after two o'clock as possible and I will ask counsel to draw an order and then after that is done I will hear counsel on that order.

[fol. 508] Noon Recess

(Counsel met in private session and at 4 p. m. proceedings continued as follows:)

The Court: We are now reconvened in open court for the purpose of considering the form of the order which I understand counsel have conferred on during the recess period.

Mr. Carpenter: I now submit, if your Honor please, a form of order that was prepared by Major Oliver and his office and which has been examined by all parties and approved by the State of New Jersey by its Attorney General.

It provides for the payment by the Trustee to the State within ten days the sum of $15,250,000 cash on account of tax claims of the State for the years '32 to '40, inclusive, including interest thereon, if any. Payment to be made under the conditions specified in the order.

The Court: Is there anyone present who desires to offer any objection to the form and substance of this order?

(No response.)

The Court: Apparently there are no objections. You may submit the order.

(The order was submitted and, after examination, was signed by the Court.)

The Court: Gentlemen, I desire to express the thanks of the Court for your cooperation in arriving at a solution of what has been more or less difficult.

Thank you very much.

The court stands adjourned.

[fol. 509] Copy

STATE OF NEW JERSEY, DEPARTMENT OF TAXATION AND FINANCE, HOMER C. ZINK, COMMISSIONER, TRENTON 7

May 6, 1946.

Hon. Walter P. Gardner, Trustee,
The Central Railroad Company of New Jersey,
Jersey City Terminal,
Jersey City 2, New Jersey.

Dear Judge:

I acknowledge receipt of check for $15,250,000, enclosed in your letter of May 6, 1946, tendered pursuant to Order No. 333, entered April 26, 1946 in the District Court of the United States for the District of New Jersey, in the pending case entitled "In the Matter of The Central Railroad Company of New Jersey, Debtor. In Proceedings for the Reorganization of a Railroad No. 29,778."

Yours truly,

(S) HOMER C. ZINK, Commissioner,

Department of Taxation and Finance.

HCZ:A

[fol. 510] UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY

I, William H. Tallyn, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the printed documents annexed hereto, numbered 1 to 29 inclusive, which are set forth in Exhibit "A" annexed hereto, being numbered 1 to 29, inclusive, are true copies of portions of the record in the District Court of the United States for the District of New Jersey in the proceedings for the reorganization of The Central Railroad Company of New Jersey, No. 29,778, as the same remain of record, and on file in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at Newark, in said

District, this 31st day of July, A. D. nineteen hundred and forty-six.

William H. Tallyn, Clerk. By Michael Oller, Jr., Deputy Clerk.

[fol. 511] [File endorsement omitted.]

Endorsed on cover: File No. 50,846, U. S. Circuit Court of Appeals, Third Circuit, Term No. 92. Walter P. Gardner, Trustee of The Central Railroad Company of New Jersey, Petitioner, vs. The State of New Jersey. Petition for a writ of certiorari and exhibit thereto. Filed April 20, 1946. Term No. 92 O. T. 1946.